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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1994, Term

PETER A. CRAWFORD, Petitioner,

v.

CHARLES R. LaMantia, Respondent.

# PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

(1) Whether a former employee who receives a lump sum distribution from a leveraged Employee Stock Ownership Plan (ESOP) has standing to sue the ESOP's fiduciaries for paying more than adequate consideration for employer stock.

(2) Alternatively, whether an employee who was a participant in the plan at the time of the breach by the ESOP Trustees and a current employee at the time the lawsuit was instituted but has since terminated employment has standing to sue the ESOP's fiduciaries for paying more than adequate consideration for employer stock.

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## PARTIES TO THE PROCEEDING

The Plaintiff/Petitioner is Peter A. Crawford. The Defendants/Respondents are Paul D. Littlefield, Irving H. Plotkin and Harland A. Riker, Jr., individually and in their capacity as Trustees of the Arthur D. Little, Inc. Employee Stock Ownership Plan and Trust.

**OFFICIAL AND UNOFFICIAL**

**REPORTS OF OPINIONS DELIVERED**

**IN THE CASE BY OTHER COURTS**

Peter A. Crawford v. Charles R. LaMantia, et al., CA-1038-WF (D. Mass. 1993) (unpublished) [reprinted in A-1 - A-21].

Peter A. Crawford v. Charles R. LaMantia, et al., 34 F.3d 28 (1st Cir. 1994) [reprinted in A-23-A-44].

## STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(1) The judgment in this case was entered by the First Circuit on September 14, 1994 (A-45).

(2) A request for rehearing and a rehearing *en banc* was filed by the Petitioner on September 28, 1994 (A-53). The request for rehearing was denied on November 29, 1994, and the suggestion for rehearing *en banc* was also denied on November 29, 1994 (A-62).

(3) Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

**Statutes**:

**ERISA § 3(7), 29 U.S.C. § 1002(7)** - The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

**ERISA § 3(18)B, 29 U.S.C. § 1002(18)(B)** - The term "adequate consideration" when used in part 4 of subtitle B means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1934, or (ii) if the security is not traded on such a national securities

exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

**ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1)** - Except as provided in paragraph (2), (3), or (4) or subsection (d), or under section 4042 and 4044 (relating to termination of insured plans), or under section 420 of the Internal Revenue Code of 1986 (as in effect on January 1, 1991) the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administration the plan.

**ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)** - Subject to sections 403(c) and (d), 4042 and 4044, a fiduciary shall discharge his duties

with respect to a plan solely in the interest of the participants and beneficiaries and

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

**ERISA § 406(a)(1&2) and (b), 29 U.S.C. § 1106(a)(1&2) and (b) -**

(a) Except as provided in section 408:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect:

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a).

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a).

(b) A fiduciary with respect to a plan shall not:

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the

interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

**ERISA § 407(d)(6)(A&B), 29 U.S.C. § 1107(d)(6)(A&B)** - The term "employee stock ownership plan" means an individual account plan:

(A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase plan both of which are qualified, under section 401 of the Internal Revenue Code of 1986, and which is designed to invest primarily in qualifying employer securities, and

(B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

**ERISA § 408(b)(3), 29 U.S.C. § 1108(b)(3)** - The prohibitions provided in section 406 shall not apply to any of the following transactions:

A loan to an employee stock ownership plan (as defined in section 407(d)(6)), if:

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 407(d)(5)).

**ERISA § 408(e), 29 U.S.C. § 1108(e)** - Section 406 and 407 shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5)) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 407(d)(4)):

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 407(e)(1)),

(2) if no commission is charged with respect thereto, and

(3) if -

(A) the plan is an eligible individual account plan (as defined in section 407(d)(3)), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 407(a).

**ERISA § 502(a), 29 U.S.C. § 1132(a)** - A civil action may be brought:

(1) by a participant or beneficiary

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (1) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain

other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this title;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A));

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1), (A) to enjoin any act or practice which violates subsection (f) of section 101, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the

terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

## STATEMENT OF THE CASE

Arthur D. Little, Inc. ("ADL") is a Cambridge, Massachusetts based international consulting firm (A-26). The petitioner, Peter A. Crawford ("Crawford") began working at ADL as a Management Consultant on June 7, 1981 (A-26). In March 1988, ADL's Board of Directors voted to form an ESOP pursuant to 26 U.S.C. § 4975(e)(7) of the Internal Revenue Code and to propose a going-private transaction whereby ADL would (1) acquire for $60 per share all outstanding publicly held, minority shares of ADL stock then trading at $33 per share;[1] (2) cancel all existing shares of ADL stock; (3) reissue "New Shares" which were equivalent to .946288 Old Shares; and (4) sell a portion of the New Shares to the ESOP at $60 per share with financing from ADL (which in turn received bank financing) (A-26-27). Crawford objected to the transaction for a variety of reasons, and delivered to the Department of Labor a thirty-two page

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[1]Amended Complaint, ¶ 28, A-79.

memorandum detailing his belief that as part of the going-private transaction, the ESOP Trustees were intending to buy ADL common stock in "excess of adequate consideration" within the meaning of 29 U.S.C. § 1002(18) (A-27). Crawford urged the Department of Labor to seek an injunction enjoining ADL from consummating its plan (A-27). The Department of Labor declined Crawford's invitation, and on June 14, 1988, the ADL shareholders approved the proposed transaction (A-28). ADL loaned to the ESOP Trustees $32.8 million in order to purchase 546,520 New Shares of ADL common stock at $60 per share (A-28). The new ADL stock was deposited within the ESOP to be released over the next seven years on a pro rata basis to the individual accounts of qualified employee participants of the ESOP (A-28). ADL agreed to make tax deductible contributions to the ESOP sufficient to repay the principal and interest due ADL (and its banks) on the ESOP loan (A-28-29).

On November 30, 1988, Crawford was informed that due to budget cuts he was to be terminated (A-29). Crawford negotiated an extension of salary and benefits until March 24, 1989 with an unpaid 60 day leave thereafter (A-30). On May 12, 1989, Crawford filed his

initial complaint in this action *pro se* (A-30). Crawford then resigned from ADL effective May 18, 1989 (A-30). Plaintiff was cashed out from the ESOP pursuant to ESOP plan provisions on May 7, 1990 (A-30). On June 10, 1993, Crawford filed an amended complaint seeking recovery on behalf of the ESOP for breach of fiduciary duty by the Trustees who paid "excess" consideration for the new ADL shares (A-31). Plaintiff invoked jurisdiction in the District Court pursuant to 29 U.S.C. § 1132(e) [ERISA § 502(e)]. In his amended complaint, Crawford alleged that the ESOP Trustees (1) failed to negotiate with ADL concerning the diluted value of the New Shares purchased by the ESOP as a result of a 5.68% dividend granted to the Memorial Drive Trust "MDT" which controlled 70% of the ADL stock prior to the transaction (A-74), and (2) failed to consider the debt charges for financing the ADL stock purchase which would lower ADL's projected earnings, thus, prospectively reducing the value of the ADL common shares (A-74). Crawford also alleged in his amended complaint that the ESOP Trustees depended excessively upon the valuation conducted by Brian Freeman which (1) was based on overly optimistic financial projections, (2) failed to apply proper valuation principles in its

analysis, and (3) failed to consider the prices of similar transactions and values of publicly held companies (¶ 37, A-80-83). The District Court granted Crawford's Motion to Amend his Complaint on June 24, 1993 (A-32). The ESOP Trustees then renewed their motions for summary judgment. In opposition to the ESOP Trustees' motion for summary judgment, Crawford submitted expert reports of Robert Socol that demonstrated Mr. Freeman's analysis of the fair market value of the ADL stock was seriously flawed (A-89-110). The District Court granted defendants' motion for summary judgment by order dated October 12, 1993 (A-21). Crawford filed a timely notice of appeal to the First Circuit. On appeal, Crawford argued that he had standing because he was a current employee of ADL at the time he filed the lawsuit and alternatively as a former employee, he suffered a reduction in the amount of his vested benefits as a result of the purchase by the ESOP Trustees of overpriced stock. The First Circuit rejected Crawford's argument that he had standing as a current employee noting that he was not a current employee throughout the litigation. *Crawford v. LaMantia*, 34 F.3d 28, 32 (1st Cir. 1994) (citing *Sommers Drug Stores Co. Employee Profit Sharing Plan v.*

*Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989)) (other citations omitted). The First Circuit also rejected Crawford's second argument that as a former employee he had suffered a reduction in benefits when the ESOP Trustees overpaid for the new ADL stock. In a statement that appears broadly applicable to all ESOP participants, the Court held:

> "Had defendants not overvalued the shares, they would not have borrowed as much money from ADL. Instead, a recalculation of the price of the stock would have resulted only in a smaller loan, lower principal and interest payments to be paid quarterly by ADL, and the same number of New Shares placed in the suspense account. It would *not* have resulted in a similar loan being made to the ESOP with any excess cash to be distributed to the accounts of the participants. The borrowed funds were not available for distribution; they were to be used *exclusively* to buy stock, or in the alternative, to pay back the loan."

Id. at 33. (Emphasis Supplied).

The First Circuit affirmed the lower Court by its decision dated September 14, 1994 (A-44). A request for rehearing and/or rehearing *en banc* was filed by Crawford on September 28, 1994. Accompanying Crawford's motion for rehearing, the Department of Labor moved for leave to enlarge the time for filing a Brief as Amicus

Curiae in Support of the Petitioner's Motion for Rehearing (A-58).[2] That leave was denied without reason on November 1, 1994 (A-47). The First Circuit also issued an errata sheet to its original decision of September 14, 1994 (A-59)[3] The Petitioner's request for a rehearing was denied November 29, 1994 (A-57).

## ARGUMENT

### A. CRAWFORD HAS STANDING TO BRING THIS ACTION BECAUSE HE HAS A COLORABLE CLAIM TO VESTED BENEFITS AND FALLS WITHIN THE ZONE OF INTERESTS ERISA WAS DESIGNED TO PROTECT.

Under section 502(a) of ERISA, 29 U.S.C. § 1132(a), participants have standing to bring suit to enforce ERISA's fiduciary

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[2] The Secretary of Labor in his motion at ¶ 3 stated that "this case raises an important issue relating to the proper construction of ERISA. Does an Employee Stock Ownership Plan ("ESOP") that pays more than adequate consideration for qualifying employer securities suffer a loss of plan assets within the meaning of ERISA § 409(a), 29 U.S.C. § 1109(a), where the ESOP purchases the securities with the proceeds of an exempt loan?"

[3] An additional sentence was added to FN6, p.11 of the original slip opinion distinguishing *Reich v. Valley Nat. Bank of Ariz.*, 837 F.Supp. 1259 (S.D.N.Y. 1993) from the case at bar (A-59 - A-60). But see ¶ 18, 19 of the Amended Complaint (A-75-76) where Crawford alleges that ADL lost $4.6 million the year in which the transaction occurred.

standards. "Participant" is defined under ERISA to include "any employee or former employee of an employer. . . who is or may become eligible to receive a benefit of any type from an employee benefit plan ERISA 3(7), 29 U.S.C. § 1002(7). The above statutory language was considered by the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) when determining who was a participant under ERISA for the purpose of requiring disclosure of plan documents. The Supreme Court adopted a two-prong disjunctive test by holding that "participant" should be read to include employees in, or reasonably expected to be in, currently covered employment [the current employee test] or former employees who have. . . a reasonable expectation of returning to covered employment or who have a 'colorable claim' to vested benefits. Id.

Addressing first the second prong of the *Firestone* test, Crawford alleges that as a former employee he received reduced benefits as a result of the breach by the ESOP Trustees who paid too much for ADL stock to the detriment of each participant's account, including his own.[4] The ESOP's loss can be measured by the

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difference between the amount paid for the stock and its fair market value at the time of purchase. See *III Scott on Trusts* (4th ed. 1988) § 205 at 242 ("where the trustee is authorized to purchase property for the trust, and in breach of the trust he pays more than its fair value, he is chargeable with the amount that he paid in excess of the fair value"). As a participant whose account value was impaired by fiduciary misconduct, Crawford is entitled to a pro rata share of a recovery of that loss. Consequently, Crawford has a colorable claim to vested benefits within the meaning of *Firestone*.

In *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 347-50 (5th Cir. 1989), the Fifth Circuit held that the plaintiffs had standing to sue the trustees of a terminated profit sharing plan for violating their fiduciary obligations by selling the plan's stock to a party in interest for less than adequate consideration. The Court reasoned that the plaintiffs still had a colorable claim to benefits, even though they had already received lump sum

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[4] An ESOP is by definition under ERISA an individual account plan, ERISA § 3(34), 29 U.S.C. 1003 (34), where benefits are based solely upon the amount contributed to the participant's account and any income, expenses, gain and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

distributions, because the fiduciary breach had allegedly resulted in smaller distributions than they would otherwise have received. See *Kuper v. Quantum Chemical Corp.*, 829 F.Supp. 918 (S.D. Ohio 1993) (former participants in a terminated ESOP having standing to seek losses under ERISA based upon claims related to the diminution of the value of their stock). That finding is consistent with established trust law that if the "Trustee prior to the transfer of the trust property to the beneficiary incurred a liability for breach of trust, the transfer, although it terminates the trust of the property, does not discharge the trustee from his liability for the breach of trust." *Restatement (Second) of Trust § 342 (1959).* See also *Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232 (9th Cir.), *cert. denied*, 11 S.Ct. 254 (1990) (former participants had standing to compel payment of unallocated reserves); *Wright v. Bosch Trucking Co., Inc.*, 804 F.Supp. 1069 (C.D. Ill. 1992) (involuntarily terminated employee who accepted lump sum distributions deemed "participant" where portion of vested amount subject to possible divestment); *Amalgamated Clothing and Textile Workers' Union v. Murdock*, 861 F.2d 1406, 1417 (9th Cir. 1988) (claim for breach of fiduciary responsibility considered a 'benefit

of any type' justifying standing despite the distribution of vested benefits).

The First Circuit's decision on the facts of the present case is inconsistent not only with *Sommers* and *Kuper*, but also with its own decision in *Vartanian v. Monsanto*, 14 F.3d 697 (1st Cir. 1994). In *Vartanian*, the First Circuit adopted an expansive reading of ERISA's standing provisions which is wholly at odds with the Court's treatment of Crawford's claim in this case. In *Vartanian*, the Court held that the central inquiry in determining standing is whether the plaintiff falls within the "zone of interests" ERISA was designed to protect, rejecting a rigid application of the *Firestone* test, which had been developed outside the context of standing. Id. at 701-02.[5] The Court noted that "[i]n determining who is a 'participant' for purposes of standing, the definition found in 29 U.S.C. § 1002(7) must be read in the context of traditional concepts of standing, not in the context of adjudicating the ultimate issue of the merits of the plaintiffs' claim. . . ." Id. at 701

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[5] See also *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 668 (2d Cir. 1994) where the Second Circuit expressly endorsed the *Vartanian* view as to standing.

(quoting *Astor v. International Business Machines Corp.* , 7 F.3d 533, 538-39 (6th Cir. 1993)). In adopting a broad reading of participant standing, the Court stressed ERISA's "intention to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants."[6]

Accordingly, *Vartanian* held that a plaintiff had standing to sue his former employer for allegedly misleading him about the impending creation of a new plan which would have provided better benefits than the plan under which he ultimately retired. Although the plaintiff had retired and received a lump sum distribution of all his benefits under the old plan before he brought suit, he had been a participant in an employee benefit plan at the time of the alleged breach of ERISA's fiduciary obligations, and thus fell "squarely within the 'zone of interest' ERISA was designed to protect." Id.

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[6] Id. at 702 (quoting S. Rep. No. 127, 93d Cong., 2d Sess., 3 (1974) reprinted in 1974 U.S.C.C.A.N. 4639, 4871).

In the present case, Crawford alleges that the ESOP trustees purchased employer stock at an inflated price in violation of ERISA's prohibited transaction provisions (ERISA § 406(a), 29 U.S.C. § 1106(a)) (A-80) and in breach of the fiduciaries duties of prudence and loyalty (ERISA § 404(a)1), 29 U.S.C. § 1104(a)(1)), at a time (June, 1988) when Crawford was unquestionably a participant in the ESOP. As a result Crawford and the other ESOP participants suffered a reduced level of benefits.[7] Under *Vartanian*'s reasoning, Crawford falls within ERISA's zone of interests and has standing to bring this suit.

**B. THE ESOP AND ITS PARTICIPANTS, INCLUDING THE PLAINTIFF, SUFFERED A LOSS IF THE ADL STOCK WAS OVERPRICED.**

The First Circuit, when presented with the issue of whether ESOP trustees that borrow funds from the employer to purchase stock of the employer at a price higher than the fair market value have

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[7] The First Circuit erred in its attempt to distinguish its holding in *Vartanian* from its holding in the case at bar *Crawford v. LaMantia*, 34 F.3d 28, 33 n.7 (1st Cir. 1994). Crawford's share of the recovery to the ESOP constitutes a claim for vested benefits.

breached their fiduciary duties to the plan participants, adopted a discredited legal theory; the "no loss" theory.[8]

According to the Court, "Had the trustees not overvalued the ADL shares, the trustees would have borrowed less from ADL. A downward recalculation of the price of stock [to reflect fair market value] would have resulted in a smaller loan, lower principal and interest payments. . .and the same number of New Shares placed in the suspense account." As there was no obligation to distribute any excess cash [from the overvaluation] to the accounts of the participants, the plaintiff [and other participants] suffered no loss. *Crawford v. LaMantia*, 34 F.3d 28, 33 (1st Cir. 1994). Stated otherwise, such trustees can pay whatever price they want for the employer stock regardless of specific ERISA requirements such as (1) investing the assets for the exclusive benefit of participants and beneficiaries, ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B); (2) permitting a sale or exchange between the ESOP and "party in interest," ERISA § 406(a)(1)(A), 29 U.S.C. § 1106 (a)(1)(A); [only if]

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[8] See *Reich v. Valley Nat. Bank of Ariz.*, 837 F. Sup 1259, 1284 (S.D. N.Y., 1993).

the securities are qualified employer securities acquired for "adequate consideration", ERISA § 408(e), 29 U.S.C. § 1108(e), and (3) providing for any agreement that relieves a fiduciary from any responsibility, ERISA § 410(a), 29 U.S.C. § 1110(a).

To date, no other circuit has adopted such a theory. In fact, in all circuits that have ruled on the issue, each has adopted legal reasoning that lies in direct conflict with the First Circuit's "no loss" theory. In *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984), the Fifth Circuit ruled that fiduciaries of an ESOP, which was part of an LBO transaction, breached their fiduciary duties under ERISA by purchasing certain stock on behalf of the ESOP for more than adequate consideration as defined by ERISA § 3(18). Id. at 1473-74. In so holding, the Fifth Circuit stressed that "ESOP fiduciaries will carry their burden to prove that adequate consideration was paid by showing that they arrived at their determination of fair market value by way of a prudent investigation in the circumstances then prevailing." Id. at 1467-68.

In *Reich v. Valley Nat. Bank of Ariz.* , the Southern District Court of New York, faced with overvaluation of stock in a leveraged buyout transaction, soundly rejected the "no loss" theory by holding:

> "Valley's argument that no loss could have been occasioned by the LBO transaction goes counter to ERISA's fiduciary standards and raises the dangers warned of by Congress. Congress clearly believed that a leveraged ESOP investing in employer securities was investing plan assets that were subject to possible loss. Valley's position would lead, logically, to a conclusion that would eviscerate the congressional intent behind the protections enacted for the benefit of plan participants; the conclusion that an ESOP could participate in the leveraged buyout of the sponsoring entity and pay any price per share possible, without suffering any loss no matter how dear the price. This argument renders the 'adequate consideration' protection of 29 U.S.C. § 1108(e) a nullity. Congress clearly felt otherwise.

*Reich v. Valley Nat. Bank of Ariz.*, 837 F.Supp. 1259, 1287 (S.D.N.Y. 1993) (emphasis added).

Like *Reich*, all district courts to rule on the issue have held that an ESOP fiduciary's purchase of stock for more than "adequate consideration" gives rise to a valid ERISA claim under its fiduciary duty sections. See *Hood v. Smith's Transfer Corp.*, 762 F.Supp. 1274 (W.D. Kentucky 1991); *Brumfield v. Shelton*, 727 F.Supp. 282 (E.D.

La. 1989); *Ershick v. United Missouri Bank of* Kansas City, 1990 WL 126929 (D. Kan. 1990).

The Court's holding that the plaintiff is unharmed even if the ADL stock was overpriced is fundamentally at odds with ERISA's text. ERISA *prohibits* fiduciaries from causing ESOPs to purchase stock sold by a party in interest (including a sponsoring employer such as ADL)[9] unless the transaction is for "adequate consideration" within the meaning of a statutory exemption set forth in Section 408(e) of the statute, 29 U.S.C. § 1108(e).[10] "Adequate consideration" is defined as "the fair market value of the asset as determined in good faith by the trustee or named fiduciary. . . ." ERISA § 3(18), 29 U.S.C. § 1002(18). Thus, ERISA permits ESOP fiduciaries to purchase employer stock only if they can demonstrate that the stock was purchased for fair market value as determined "by way of a prudent investigation in the

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[9]*See* ERISA § 3(14)(C), 29 U.S.C. § 1002(14)(C).

[10] ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A), prohibits fiduciaries from causing any "sale or exchange" of property between a plan and a "party in interest", and ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) prohibits fiduciaries from causing the assets of a plan to be transferred to, or used by or for the benefit of, any "party in interest." Under these provisions, the stock purchase was prohibited unless exempt under Section 408(e), 29 U.S.C. § 1108(e).

circumstances then prevailing." *Donovan v. Cunningham*, 716 F.2d 1455, 1467-68 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

Congress also emphasized the importance of paying the appropriate price for employer securities in the legislative history of Section 408(b)(3), 29 U.S.C. § 1108(b)(3), which provides an exemption from ERISA's prohibited transaction provisions for loans made to ESOPs primarily for the benefit of the plans' participants and beneficiaries at reasonable interest rates. In the legislative history of the exemption, Congress expressed its concern that in leveraged ESOP transactions "the purchase price of the stock from the party-in-interest should not be too high, so that plan assets might be drained off" and, accordingly, directed the Secretary of Labor[11] to give "special scrutiny to such transactions". H.R. Rep. No. 1280, 93d Cong., 2d Sess. (1974) at 313, reprinted in 1974 U.S. Code Cong. & Admin. News 5038, 5093.

The Act and its legislative history make clear that the fiduciaries of the ESOP have the obligation to ensure that the ESOP

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[11] See also ¶ 3 of Motion of the Secretary of Labor for Enlargement of Time in which to File a Brief Amicus Curiae In Support of Petition for Rehearing (A-49).

did not spend more on ADL's stock than the stock was worth. It makes little sense to require plan fiduciaries to prudently investigate the stock's value and pay no more than fair market value, if participants are unharmed regardless of the price paid. The text of ERISA cannot be squared with a holding that would permit fiduciaries to purchase employer stock at any price, no matter how high, and immunize trustees from participant lawsuits seeking recovery of the loss resulting from excessive payments.

Under a plain reading of the statute, the participants of the ESOP suffered a loss if the stock was overvalued. In this case the defendants committed the ESOP to purchase 546,520 shares of ADL stock for $60 a share (A-28). The stock was deposited in the ESOP's suspense account to be released to individual participants' accounts over a seven year period as the ESOP paid back the loan (A-28). If the stock was not worth the $60 per share paid for it, the participants, including the plaintiff, ultimately received fewer shares or less valuable stock than they should have received, and the ESOP suffered a loss.

Nevertheless, the Court held that the plaintiff failed to show any injury even if the stock were overpriced, reasoning that if the parties had properly valued the stock, they would simply have entered into a different transaction involving a smaller loan, lower employer contributions, and the same number of shares being held by the ESOP.[12]

The Court's analysis is in error because it fails to give effect to ERISA's adequate consideration requirement. When the defendants committed the ESOP to purchase ADL's stock, they had an obligation to observe ERISA's commands. See *Reich v. Valley Nat. Bank of Ariz.*, 837 F.Supp. 1259, 1287-88 (S.D.N.Y. 1993) (". . . "while an employer is under no obligation to establish an ESOP, once it does so ERISA's standards apply. An employer cannot condition Plan contributions on a violation of ERISA. . . ."). ERISA compelled the fiduciaries to buy

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[12] The petitioner does not know the basis of the Court's supposition that the parties would have simply entered into a different transaction with a smaller loan, lower contributions and the same number of shares. There is no evidence in the record to support this conclusion and the District Court made no such finding. The issue was not even discussed during oral argument. Furthermore, nothing in ERISA would have prohibited the ESOP trustees from receiving more stock or other considerations if the stock alone were overpriced.

the stock for its fair market value. The defendants were not free to disregard ERISA's requirements on the theory that the parties would never have agreed to the transaction on the same terms if they had been compelled to give the participants stock worth the amount paid, as required by ERISA. The plan's participants were entitled to the benefit of the bargain. If the plan's assets were expended (or "drained off") for overpriced stock, they suffered a loss. In this case, Crawford, a vested participant, received a diminished distribution of plan benefits for just this reason. As a result, he has a claim under ERISA and standing to bring that claim.

**C. AN EMPLOYEE WHO WAS A PARTICIPANT IN THE PLAN AT THE TIME OF THE BREACH BY THE ESOP TRUSTEES AND A CURRENT EMPLOYEE AT THE TIME THE LAWSUIT WAS INSTITUTED BUT HAS SINCE TERMINATED EMPLOYMENT HAS STANDING TO SUE THE ESOP'S TRUSTEES FOR PAYING MORE THAN ADEQUATE CONSIDERATION.**

In dismissing Crawford's argument that he had standing as a current employee, the First Circuit, citing *Sommers Drug Stores Co.*

*Employee Profit Sharing Plan v. Corrigan,* 883 F.2d 345, 348 (5th Cir 1989), stated:

> . . . "although plaintiff may have had standing as a current employee when he brought this action, by the time he filed his amended complaint, he lost his standing on account of having terminated his employment with ADL and having collected all vested benefits then due him [without regard to the alleged overpayment by the ESOP trustees] from the ESOP."

*Crawford v. LaMantia*, 34 F.3d 28, 32 (1st Cir. 1994).

In determining whether for purposes of standing a current employee must maintain that status throughout the litigation, petitioner urges the Supreme Court to consider its own decision with respect to an analogous issue in *Gollust v. Mendell*, 111 S.Ct. 2173 (1991).

In *Gollust*, the plaintiff/shareholder instituted a § 16(b) insider trading action on behalf of the corporation alleging that the defendants were liable to the corporation for $11 million in profits earned by the defendants from trading stock in the corporation. Id. at 2176. After the commencement of the action, the corporation was acquired by another corporation and the shareholders, including the plaintiff, exchanged their shares in the original corporation for shares in the new

corporation. Id. The United States District Court for the Southern District of New York granted the defendants' motion for summary judgment on the basis that plaintiff no longer had standing because after the take over, the plaintiff no longer held stock in the corporation. Id. at 2177. The United States Court of Appeals for the Second Circuit reversed. *Mendell v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990). The United States Supreme Court affirmed the reversal holding that it was not necessary for the plaintiff to continue to hold stock of the issuer in order to maintain his insider trading action where he had a financial stake in the parent corporation. Id.

As in the present situation, the plaintiff in *Gollust* had standing at the initiation of the action. As in the present situation, the status of the plaintiff in *Gollust* was altered after the commencement of the litigation. As in the present situation, the change in status of the plaintiff was involuntary. The Supreme Court emphasized this fact. It noted that the "danger of such intentional restructuring to defeat the enforcement mechanism incorporated in the statute is clearly present." Id. at 2177 n. 5 (quoting *Mendell v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990)). Finally, in each case, the plaintiff had an economic interest in

the outcome. In *Gollust,* that interest was in the recovery of insider profits, and in the case at bar, that interest was in the recovery of the pro rata share of the overpayment.

Crawford's maintenance of this action is "not barred by the language of the statute or by existing case law, and it is fully consistent with the statutory objectives" and therefore the lower court erred in granting summary judgment in favor of the Respondents. *Gollust v. Mendell,* 111 S.Ct. 2173, 2177 (1991).

## CONCLUSION

For all reasons set forth above, the petitioner requests that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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941302 JAN 27 1995

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1994, Term

PETER A. CRAWFORD, Petitioner,

v.

CHARLES R. LAMANTIA, Respondent.

# PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
for the First Circuit

# APPENDIX

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41435.1

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

C.A. No. 89-1038-WF

PETER A. CRAWFORD,
Plaintiff,
V.
JOHN F. MAGEE, et al.,
Defendants.

MEMORANDUM AND ORDER

WOLF, D.J.

October 12, 1993

Defendants' motion for summary judgment in this case is directed at the amended complaint, which was filed June 10, 1993, to conform with the previously filed stipulation of dismissal. There is

no claim in the amended complaint under § 510 of ERISA (29 U.S.C. § 510) that the plaintiff, Peter A. Crawford, was terminated improperly in order to deprive him of standing to initiate or maintain this action. In addition, plaintiff is not claiming that he has a reasonable expectation of returning to employment. Rather, he asserts that he has standing to maintain the ERISA claim for breach of fiduciary duty alleged in this case by virtue of the fact that he was an employee when he brought the case, and that as a former employee he has certain rights.

Although the amended complaint has some allegations which seek to characterize it as a class action, the only recovery sought is recovery for the benefit of the Employee Stock ownership

Plan (the "ESOP"). More specifically, in his amended complaint, plaintiff states, "This suit seeks recovery for the ESOP of that excess payment made by the ESOP trustees for the Arthur D. Little ("ADL") stock plus attorneys' fees and costs." Amended complaint at 2. This allegation is consistent with the (general principles discussed in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 139-42 (1985), in which the Supreme Court discussed at length suits for breach of fiduciary duty, emphasizing that the terms of the ERISA statute indicate that such suits are to be brought for the benefit of the plan as a whole, rather than for the benefit of individuals. Finally, the court notes that there is no claim in the amended

complaint that the plaintiff is entitled to vested benefits.

This matter comes before me on a motion for summary judgment. Therefore, I have to look at the record in the light most favorable to the plaintiff and determine whether any material facts are genuinely in dispute. See Attallah v. United States, 955 F.2d 776, 779 (1st Cir. 1992). If facts material to the issue of his standing, or otherwise relevant to his right to maintain this action, are genuinely in dispute, I would deny the motion for summary judgment. I find, however, that although there are disputes, none of them are material to the disposition of the pending motion or, indeed, the case.

More specifically, in looking at the record in the light most favorable to the plaintiff, I assume, without deciding, that the evidence is sufficient to place in dispute whether Crawford was an employee of ADL on May 12, 1989, and thus had standing when he brought this suit.[1]

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[1] Further consideration of the record after the August 16, 1993 hearing indicates that this assumption may not have been appropriate, and that the evidence may be insufficient, even when considered in the light most favorable to Crawford, to permit the reasonable inference that he was an employee of ADL when he initiated this action. Defendants contend, and plaintiff does not contest, that plaintiff was an employee-at-will at ADL. In November 1988, he was informed that he "would be better off elsewhere." Affidavit of Peter Crawford (March 27, 1992) ¶ 13. Defendants assert that Crawford was formally terminated, and his salary cut off on March 24, 1989. Affidavit of Diana Fahey is ¶¶ 6-7. Crawford claims that prior to March 24, 1989, he requested and received an unpaid leave of absence, which was extended until May 26, 1989. Affidavit of Peter Crawford

However, although this is not a case of a shareholder suing the corporation, I find that the principles of Rule 23.1 of the Federal Rules of Civil Procedure are substantially applicable and that the considerations are comparable. See Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 287 (2d Cir. 1993); Thornton v. Evans, 692 F.2d 1064, 1079-80 (7th Cir. 1982) ; Mertens v. Kaiser Steel Retirement

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(March 27, 1992) ¶ 15. Crawford concedes, however, that he did not receive a salary during this leave. Id. Notwithstanding the facts that Crawford continued to use his office and secretary from March to May, and received a bonus and partial medical insurance during this time period, the evidence that ADL terminated Crawford and cut off his salary more strongly indicates Crawford was no longer an employee after March 24, 1989. Nevertheless, I have analyzed the present motion as if Crawford was an employee and thus had standing when he filed this suit.

Plan, 744 F. Supp. 917, 923 (N.D. Cal. 1990), aff'd sub nom, Mertens v. Black, 948 F.2d 1105 (9th Cir. 1991).

In the context of a derivative suit, the named plaintiff must retain his ownership or membership interest in the derivative plaintiff throughout the litigation. Otherwise, the action abates. See Lewis v. Chiles, 719 F.2d 1044, 1047 (9th Cir. 1983); Lewis v. Knutson, 699 F.2d 230, 237-38 (5th Cir. 1983); Portnoy v. Kawecki; Berylco Industries, Inc., 607 F.2d 765, 767-69 (7th Cir. 1979). As Wright and Miller explain:

> Since plaintiff's standing to maintain a secondary action depends on the indirect interest that he has in the outcome of the litigation, it has..... been held that the ownership requirement continues throughout the suit and that the action will abate if plaintiff ceases to be a

> shareholder before the termination of the litigation.

7A Wright, Miller, and Kane, Federal Practice and Procedure § 1826. The cases that have addressed whether a person needs to continue to own stock to maintain the derivative action illuminate how the Supreme Court decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1988), ought to be interpreted for the purposes of this case.

The Supreme Court has enunciated a specific test for determining whether an individual has standing to maintain an ERISA claim. In Firestone, the Court stated:

> In our view, the term "participant" is naturally read to mean either "employees in, or reasonably expected to be in, currently covered employment, or former employees who "have a reasonable expectation of

> returning to covered employment" or who have a colorable claim" to vested benefits.

Id. at 117. The term "participant" was analyzed in that case because one must be a participant, beneficiary, or fiduciary to maintain a civil action in an ERISA case. See 29 U.S.C. § 1132(a) (2) For purposes of this case, the way the test ought to apply is somewhat ambiguous and that is why I mentioned the conventional interpretation of F.R.Civ.P. 23.1. The analysis done in the Rule 23.1 cases influences me to believe that when, as here, somebody was an employee when he brought the case, but was subsequently terminated, he may continue to maintain an ERISA case only if he has a proper form of economic stake in the outcome of the litigation; that is, a reasonable

expectation of returning to covered employment or a colorable claim to vested benefits.

The derivative action cases are consistent with this analysis, in that they require some economic stake. Similarly, under Firestone, unless a terminated employee alleges, as Mr. Crawford does not here, that he was terminated to deprive him of standing, his right to maintain the action must be analyzed under the "former employee" provisions of the Firestone test. Therefore, it must be determined whether Mr. Crawford has a colorable claim to vested benefits. As noted above, he makes no claim for vested benefits in his amended complaint now before the court.

Several courts have made clear that, generally, a damage claim on behalf of an ERISA plan is not a benefit claim. See Kuntz v. Reese, 785 F.2d 1410, 1411 (9th Cir.), cert. denied, 479 U-S. 916 (1986); Joseph v. New Orleans Electrical Pension and Retirement Plan, 754 F.2d 628, 630 (5th Cir. 1985). The evidence in this case indicates that Mr. Crawford's claim is a damage claim comparable to that asserted in Kuntz. The recovery sought by the amended complaint will go to the ESOP. There is no clear obligation of the ESOP to pay the plaintiff any more. The recovery will not directly affect payment to him, nor is there any ascertainable amount that he would be paid if he were allowed to maintain this action and prevailed.

The plaintiff relies largely on the cases of Sommers Drug Store Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345 (5th Cir. 1989), and Amalgamated Clothing and Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d 1406 (9th Cir. 1988). Those are important cases. However, they are factually distinguishable from this case in crucial ways and, therefore, legally distinguishable as well.

In both Sommers and Amalgamated, the plaintiffs alleged a breach of fiduciary duty involving, in part, the liquidation of a plan in the course of paying vested benefits. See Sommers, 883 F.2d at 350; Amalgamated, 861 F.2d at 1411. In both cases, the liquidation of the plans and the payment of vested benefits were

essential elements of the alleged breaches of fiduciary duty. The cases were brought as class actions rather than derivatively because the plans no longer existed and it would not be possible for the plans to recover. Furthermore, in both cases, and most explicitly in Amalgamated, the courts indicated that if the former employees were not deemed to have standing to maintain the ERISA action, there would be no opportunity for private enforcement of the rights established by ERISA. The court in Amalgamated emphasized this point, indicating that giving standing to the plaintiffs was the only means available to give effect to the goals of ERISA. 861 F.2d at 1411. The point was expressed most explicitly when the court said:

> It would be ironic if the very acts of benefit payment and plan termination that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries standing to seek a constructive trust on those profits to redress the fiduciaries' alleged breach of the duty of loyalty.

861 F.2d at 1418.

In the present case, the alleged breach of fiduciary duty related to the ESOP paying too much for the stock of Arthur D. Little. It did not relate to the liquidation of the ESOP plan. It did not relate to the payment of any vested benefits to Mr. Crawford or anybody else at least directly. There remain a large number of potential plaintiffs, who continue to be employees and participants in the ESOP plan, who could bring this suit. In the circumstances, the standards

of Firestone, Kuntz, and Joseph, as I have interpreted them, appear to be applicable. The conclusion that Mr. Crawford lacks standing to maintain this case is also consistent with the decisions holding that a former employee does not having standing under the "reasonable expectation of returning to covered employment" prong unless the violation alleged "in and of itself divested the aggrieved parties of their status as covered employees able to sue." Christopher v. Mobil Oil Corp., 950 F.2d 1209, 1222 (5th Cir.), cert. denied, 113 S.Ct. 68 (1992) ; see Shawley v. Bethlehem Steel Corp., 989 F.2d 652, 658-59 (3d. Cir. 1993).

In candor, I will say that it appears that my decision is inconsistent with the reasoning of the District Court in the

case of Wright v. Bosch Trucking Co., Inc., 804 F.Supp. 1069 (C.D. Ill. 1992). In Wright, the court did review the adequacy of the plaintiff's representation indicating that F.R.Civ.P. 23.1 principles apply. The court, however, found standing to exist in circumstances where I would not. I respectfully disagree with that decision.

As the plaintiff lacks standing on the foregoing analysis, the discussion could end here. In the interest of completeness, however, I will also say that if the requirements of Rule 23.1 are indeed applicable to this case, the plaintiff is not a proper representative for the derivative action, largely because the claims and defenses of the

representative party are not typical of the claims and defenses of the class.

In derivative actions, courts look to a variety of factors, including:

> economic antagonisms between representative and class; the remedy sought by plaintiff in the derivative action; indications that the named plaintiff was not the driving force behind the litigation; plaintiff's unfamiliarity with the litigation; other litigation pending between the plaintiff and defendants; the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; plaintiff's vindictiveness toward the defendants; and, finally, the degree of support plaintiff was receiving from the shareholders he purported to represent.

Davis v. Comed, Inc, 619 F.2d 588, 593-94 (6th Cir. 1980) see also Larson v. Dumke, 900 F.2d 1363, 1367 (listing most of the same factors) ; GA Enterprises, Inc. v. Leisure Living Communities, Inc. 66 F.R.D. 123, 125, aff'd, 517 F.2d 24, 26 n.3 (1st

Cir. 1975) ("the interests of the unnamed plaintiffs must not be antagonistic to the interests of the representative party); Kirby v. Cullinet Software, Inc., 116 F.R.D. 303, 308 (D. Mass. 1987) (stating that in class actions, "the absence of potential conflict between the named plaintiffs and the class members and..... assurance of vigorous prosecution" are important factors in determining adequacy). In this case, there is economic antagonism between Mr. Crawford and some members of the ESOP, particularly those who also own shares in the Memorial Drive Trust, the value, of which would be diminished to the extent the ESOP recovered in this case.

In addition, Mr. Crawford's claim and the ESOP's defense are not typical. There

is, at best, a disputed fact as to whether Mr. Crawford was an employee when the case commenced in May of 1989, which relates to the issues discussed earlier concerning his standing. If at trial he lost on that issue, there would be no decision on the merits. That defense is unique to Mr. Crawford. In addition, as Mr. Crawford was terminated by Arthur D. Little, he has a unique motive for bringing this case and one might infer -although he conducted himself in a most highly professional manner during the long period he represented himself pro se -- an element of vindictiveness.

I further note, although this is not itself dispositive, that he does not seem to be getting support from others. I know there is a contention that all other

putative plaintiffs will not sue because they are intimidated, but there are a large number of employees of Arthur D. Little, including many people like Mr. Crawford with MBA's and other advanced degrees, who are especially capable of standing up and representing their own interest if they genuinely perceive that they are threatened, and, indeed, are among the class of people who are often litigious.

If the F.R.Civ.P. 23.1 adequacy requirements ought to be applied to ERISA, in my view, and I have some discretion, Mr. Crawford is not a proper party to maintain this action. I rely, however, on my earlier analysis that Mr. Crawford lacks standing under ERISA. Standing is not a discretionary matter.

Accordingly, defendants' motion for summary judgment is hereby ALLOWED.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

C.A. No. 89-1038-WF

PETER A. CRAWFORD, Plaintiff,

V.

JOHN F. MAGEE, et al., Defendants.

**JUDGMENT**

**WOLF, D.J.**

In accordance with the Court's Memorandum and Order dated October 12, 1993 granting defendants' motion for summary judgment in the above-entitled action, it is hereby ORDERED:

Judgment for the DEFENDANTS

By the Court,

Deputy Clerk

Date: October 25, 1993

41435.1

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 93-2241

PETER A. CRAWFORD,

Plaintiff, Appellant,

V.

CHARLES R. LAMANTIA, ET AL.,

Defendants, Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, U.S. District Judge]

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Before

Breyer,* Chief Judge, Bownes, Senior Circuit Judge, and Stahl, Circuit Judge.

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Alfred D. Ellis with whom Michelle L. Farmer and Cherwin & Glickman were on brief for appellant.

Peter J. Macdonald with whom Jeffrey B. Rudman, Hale and Dorr, James J. Dillon, and Goodwin Procter & Hoar were on brief for appellee.

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September 14, 1994

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*Chief Judge Stephen Breyer heard oral argument in this matter but did not participate in the drafting or the issuance of the panel's opinion. The remaining two panelists therefore issue this opinion pursuant to 28 U.S.C. § 46(d).

**STAHL, Circuit Judge.**

Plaintiff-appellant Peter Crawford filed a complaint charging defendants-appellees Paul Littlefield, Irving Plotkin and Harland Riker, Jr., individually and in their capacity as trustees of the Arthur D. Little, Inc. Employee Stock Ownership Plan and Trust ("the Plan" or "the ESOP")[1], with a breach of their fiduciary duties as defined under the Employees Retirement and Income Security Act ("ERISA"). Plaintiff now appeals the

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[1]. The ESOP is an individual account plan, i.e. "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1102 (34).

district court's grant of summary judgment in favor of defendants. After careful consideration of plaintiff's arguments, we affirm.

I.

**Factual and Procedural Background**

Arthur D. Little, Inc. ("ADL") is a Cambridge-based international consulting firm. Plaintiff began working at ADL as a management consultant on June 7, 1981. In March 1988, ADL's Board of Director's voted to form an ESOP pursuant to 26 U.S.C. § 4975(e) (7) of the Internal Revenue Code, and to propose a "going-private" transaction whereby ADL would 1) acquire all outstanding publicly held shares of ADL stock; 2) cancel all existing shares of ADL stock; 3) reissue "New Shares"; and 4) sell a portion of the

New Shares to the ESOP with financing from ADL (which in turn received bank financing). Plaintiff objected to the transaction for a variety of reasons, and delivered to the Department of Labor a thirty-two page memorandum detailing his belief that, as part of the going-private transaction, the ESOP Trustees were intending to buy ADL common stock in excess of adequate consideration within the meaning of 29 U.S.C. § 1002 (18). Plaintiff urged the Department of Labor to seek an injunction enjoining ADL from consummating its plan. The Department of Labor declined plaintiff's invitation, and on June 14, 1988, the ADL disinterested shareholders approved the proposed transaction.

Thereafter, the ESOP Trustees negotiated a $32.8 million loan from ADL. The agreement provided that the to-be-purchased ADL stock would act as collateral for the loan, which was to be paid back to ADL over a seven-year period. The borrowed funds would then be used to purchase 546,520 New Shares of ADL common stock at $60 per share. At closing, the stock would immediately be deposited into a suspense account within the ESOP to be released over the next seven years, on a pro rata basis, to the individual accounts of qualified employee participants of the ESOP pursuant to the following arrangement. Each quarter, ADL agreed to make cash contributions to the ESOP in an amount sufficient to defray the principal and interest payments due ADL on the ESOP

loan. The ESOP, in turn, agreed to return the contribution immediately to ADL in repayment of its note. Meanwhile, a proportionate number of the New Shares held in the suspense account as collateral would be freed and allocated by formula to the individual accounts of participating ADL employees. In effect, ADL was agreeing to repay the loan it was making to the ESOP to fund the purchase of the New Shares, with the employees ultimately reaping the benefits.

On November 30, 1988, plaintiff was informed that due to budget cuts, he was to be terminated.[2] Plaintiff negotiated

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[2] Plaintiff has not claimed in his amended complaint that he was terminated improperly in order to deprive him of standing to initiate or maintain this action under 29 U.S.C. § 1140.

an extension of salary and benefits until March 24, 1989, with an "unpaid leave of absence" to follow. On May 12, 1989, plaintiff filed his original complaint, pro se.[3] Plaintiff then resigned from ADL, effective May 18, 1989. Approximately one year later, on May 7, 1990, plaintiff elected to receive his total vested distribution from the ESOP in the form of 47 shares of ADL common stock

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[3] Plaintiff originally named as defendants all trustees of the Memorial Drive Trust, the Memorial Drive Trust, the trustees of the ESOP, the ESOP and Arthur D. Little, Inc. These original defendants answered the complaint and thereafter jointly filed a motion for summary judgment. On June 9, 1993, before the court ruled on defendants' motion, all parties agreed to a joint stipulation dismissing all non-ADL ESOP trustee defendants from this action.

and a check in the amount of $51.49[4] Plaintiff subsequently retained an attorney and, on June 10, 1993, filed a motion to amend his original complaint, together with an amended complaint seeking "recovery on behalf of the ESOP for breach of fiduciary duty for the Trustees' failure to act for the exclusive benefit of the participants and beneficiaries of the ESOP plan." Plaintiff also sought class certification at this time. The

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[4] ESOP participants may elect to receive their vested benefits in one of two ways. They may either take the shares then existing in their individual account or ask that the ESOP cash out their account. In order to cash out a plan participant, the ESOP Trustees must sell the stock then held in the participant's individual account to ADL, at a price based on the most recent appraised value of new shares. The Trustees, in turn, pay the participant the resulting cash proceeds.

district court granted plaintiff's motion to amend on June 24, 1993. The defendants then renewed their motion for summary judgment, including further argument directed at the amended complaint. After accepting additional memoranda and hearing oral argument on defendants' motion, the district court granted summary judgment in favor of defendants, citing plaintiff's lack of standing.

## II.

## STANDARD OF REVIEW

As always, we review a district court's grant of summary judgment de novo and, like the district court, review the facts in a light most favorable to the non-moving party. See e.g., Woods v. Friction, No. 93-2296, slip op. at 6 (1st Cir. July 29, 1994). Our review is

limited to the record as it stood before the district court at the time of its ruling. Voutour v. Vitale, 761 F.2d 812, 817 (1st Cir. 1985), cert. denied, 474 U.S. 1100 (1986). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). A material fact is one which has the "potential to affect the outcome of the suit under the applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st. Cir. 1993). Thus, the nonmovant bears the burden of placing at least one material fact into dispute

once the moving party offers evidence of the absence of a genuine issue. Darr v. Muratore, 8 F.3d 854, 859 (1st Cir. 1993) see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment, . . . upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). In other words, neither "conclusory allegations, improbable inferences, and unsupported speculation," Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990), nor "[b]rash conjecture coupled with earnest hope that something concrete will materialize, is []

sufficient to block summary judgment," Dow v. United Bd. of Carpenters, 1 F.3d 56, 58 (1st Cir. 1993).

## III.

## DISCUSSION

On appeal, plaintiff makes essentially two arguments. First, plaintiff charges that the district court erred in ruling that plaintiff lacked standing to pursue his ERISA action because he was not a current employee throughout the litigation. Second, plaintiff contends that the court erred in concluding that he lacked standing because he had failed to present a colorable claim for benefits. We discuss each of these arguments below.

Plaintiff brought this action pursuant to 29 U.S.C. 1132(a)(2), which

authorizes a "participant," "beneficiary" or "fiduciary" to bring a civil action for breach of any fiduciary duty proscribed by 29 U.S.C. § 1109(a). Because plaintiff is neither a beneficiary nor a fiduciary, our central task is to determine whether plaintiff qualifies as a plan "participant" within the meaning of ERISA. ERISA defines the term "participant" to include

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002 (7) (emphasis supplied). In Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117 (1989), the Supreme

Court interpreted this provision as providing for two distinct categories of ERISA participants: 1) "employees in, or reasonably expected to be in, currently covered employment;" or 2) former employees who have "a reasonable expectation of returning to covered employment" and/or a "colorable claim" to vested benefits. Id. at 117 (internal quotations omitted).

Plaintiff maintains that he has standing under either prong. First, he argues that he was a current employee when he initiated this action and should remain a current employee throughout the litigation for purposes of standing despite his actual termination of employment. In the alternative, he asserts that he is a former employee with

a colorable claim to vested benefits. We disagree with each of plaintiff's contentions.

With regard to plaintiff's argument that he should be considered an employee under Firestone's first prong, we note that the basis for "'[s]tanding, since it goes to the very power of the court to act, must exist at all stages of the proceeding, and not merely when the action is initiated or during an initial appeal.'" Sommers Drug Stores Co. Employee Profit Sharing v. Corrigan, 883 F.2d 345, 348 (5th Cir. 1989) (emphasis supplied) (quoting Safir v. Dole, 718 F.2d 475, 481 (D.C.Cir. 1983), cert. denied, 467 U.S. 1206 (1984)).

Therefore, although plaintiff may have had standing as a current employee

when he brought this action, by the time he filed his amended complaint, he lost this standing on account of having terminated his employment with ADL and having collected all vested benefits then due him from the ESOP.[5] Accordingly,

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[5] In his brief, plaintiff cites Nishimoto v. Federman-Bachrach & Assoc., 903 F.2d 709 (9th Cir. 1990), as support for his position that ERISA standing is frozen in time as of the date of the initial filing of the complaint. Despite plaintiff's highly suspect manipulation of the language of Nishimoto, the case contradicts, rather than supports, plaintiff's argument. The issue in Nishimoto was whether a court could adjudicate pendent state claims following the disposition of the federal claim. At the time she filed her complaint, Nishimoto was a former employee who was eligible to receive vested benefits. She "settled" her ERISA claim by accepting a lump sum payment during the course of litigation. The court noted that Nishimoto's "receipt of all the benefits she was due under the plan indicates . . . that the ERISA claim might have become subject to dismissal at that point." Id. at 715. Thus, Nishimoto's status at the

plaintiff cannot be considered a plan participant under Firestone's first prong.

Plaintiff's argument that he has standing under Firestone's second prong fares no better. Plaintiff does not contend that he has a reasonable expectation of returning to covered employment; instead, he argues that he has a colorable claim to benefits as a former employee because, "but for" defendants breach of duty, he would have received additional, vested benefits at the time he received his lump sum payment from the ESOP. Plaintiff reaches this conclusion in stages.

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time of filing was critical only as to whether the court was deprived of the power to adjudicate the remaining pendent state claims. See Id.

First, he notes that, under 29 U.S.C. § 1109 (a), fiduciaries who breach their fiduciary duties must make good to the plan any losses resulting from their breach. In this case, therefore, defendants would have to reimburse the plan the difference between the amount of money paid for the New Shares of ADL stock and the true market value. In deciding how that money should be allocated once returned to the fund, plaintiff asks the court, under the equitable powers granted by 29 U.S.C. § 1109(a), to allocate the funds to him and those members of the ESOP who were "cashed out" after the date of the transaction. Relying upon Sommers, 883 F.2d at 350, plaintiff contends that his share should be calculated by dividing the number of shares he received when he

left (47) by the total number of shares (546,520) and multiply that fraction (.00008) by the overpayment.

In Sommers, however, plan participants brought a class action suit to recover money lost during the liquidation of a retirement trust. Plaintiffs claimed that their lump sum payments were less than the amount due because the trustees had sold the trust stock for less than fair market value. Each claimant had a set number of shares which were undervalued when it came time to cash them in. Thus, they were not paid the full extent of their benefits. We have no such claim before us.

Unlike the claimants in Sommers, plaintiff has failed to show that defendants' alleged breach of fiduciary

duty had a direct and inevitable effect on his benefits. Defendants borrowed funds from ADL to acquire a set number of ADL New Shares, i.e., 546,520. Had defendants not overvalued the shares, they would not have borrowed as much money from ADL. Instead, a recalculation of the price of the stock would have resulted only in a smaller loan, lower principal and interest payments to be paid quarterly by ADL, and the same number of New Shares placed in the suspense account. It would <u>not</u> have resulted in a similar loan being made to the ESOP with any excess cash to be distributed to the accounts of the participants. The borrowed funds were not available for distribution; they were to

be used exclusively to buy stock, or in the alternative, to pay back the loan[6]

## IV.

## Conclusion

As we have explained, plaintiff failed to establish standing to sue under ERISA. The district court's grant of summary judgment in favor of defendant is therefore

**Affirmed. Costs to appellees.**

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[6] We acknowledge that because the ESOP note would have been for less money, the formula by which the encumbered shares were to be released to qualified participants might have altered the rate of release of stock one way or the other. The district court was in no position to know this, however, since plaintiff failed to argue this point and further failed to provide it with the ESOP agreement. Accordingly, there was no basis for the court to infer standing from a putative accelerated release of stock.

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7 Plaintiff makes a final argument that our recent decision in Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994), requires a more expansive view of ERISA standing. Whatever merits plaintiff's argument might have, we note that Vartanian did not involve a situation, as here, where the plaintiffs could not "establish that they were former employees with a colorable claim to vested benefits" when faced with a motion for summary judgment. See id. at 702-03 n.4. Accordingly, Vartanian is inapposite.

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**UNITED STATES COURT OF APPEALS**

**FOR THE FIRST CIRCUIT**

No. 93-2241

PETER A. CRAWFORD,

Plaintiff - Appellant

V.

CHARLES R. LAMANTIA, ET AL.,

Defendants - Appellees

**JUDGMENT**

Entered: September 14, 1994

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

Costs to appellees. Costs in favor of the appellees are taxed at $64.80.

**By the Court:**

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Clerk

cc: Alfred D. Ellis, Esq.
Peter J. Macdonald, Esq.

41435.1

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

First Circuit No. 93-2241

| | |
|---|---|
| PETER A. CRAWFORD | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| V. | ) |
| | ) |
| CHARLES R. LAMANTIA, ET AL., | ) |
| | ) |
| Defendants-Appellees | ) |
| | ) |

MOTION OF THE SECRETARY OF LABOR FOR ENLARGEMENT OF TIME IN WHICH TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

The Secretary of the United States Department of Labor ("the Secretary") moves this Court, pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure, to enlarge until the 11th of November, 1994, the time within which the

Secretary may file a brief amicus curiae, and in support thereof says as follows:

1. On September 14, 1994 the United States Court of Appeals for the First Circuit decided and filed an opinion in this matter affirming the district court's grant of summary judgment.

2. The Secretary of Labor is charged with administering and enforcing the fiduciary provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1132(a)(2) and (5). Therefore, he has a substantial interest in the application of ERISA by the courts. See Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). The Secretary's interests include promoting uniformity of law protecting

beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc).

3. The First Circuit's opinion in this case raises an important issue relating to the proper construction of ERISA: Does an employee stock ownership plan ("ESOP") that pays more than adequate consideration for qualifying employer securities suffer a loss of plan assets within the meaning of ERISA § 409(a), 29 U.S.C. § 1109(a), where the ESOP purchases the, securities with the proceeds of an exempt loan? The First Circuit held that there was no loss stating that:

> Had defendants not overvalued the shares, they would not have borrowed as much money from ADL. Instead, a

> recalculation of the price of the stock would have resulted only in a smaller loan, lower principal and interest payments to be paid quarterly by ADL, and the same number of New Shares placed in the suspense account.

Crawford v. Lamantia, No. 93-2241, slip op. at 11 (6th Cir. September 14, 1994).

4. The Secretary addressed this issue concerning the proper treatment of leveraged ESOPs (i.e., ESOPs that purchase employer securities with the proceeds of exempt loans) in Reich v. Valley National Bank, 837 F. Supp. 1259 (S.D.N.Y. 1993). In that case, the Secretary argued that it would be inconsistent with the structure and purpose of ERISA, and contrary to the "adequate consideration" requirement of ERISA § 408(e), to hold that a leveraged ESOP can, in effect, pay any price per

share for employer stock, no matter how high, without suffering a loss.

The district court categorically rejected Valley National Bank's argument that the ESOP suffered no loss when it paid more than adequate consideration for the stock, id. at 1284-88, and the Bank abandoned its "no loss" argument on appeal.[1]

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[1] Although the Bank appealed the district court's decision, the only issue raised by the Bank on appeal was whether the loss suffered by the ESOP should have been measured by the difference, if any, between what the ESOP paid for the stock and the fair market value of the stock at the time of the purchase, rather than by the total amount of contributions lost as a result of the Bank's breach of fiduciary duty. The case was finally settled this month when the Bank agreed to pay $19,000,000 to the ESOP and $44,306 in costs to the Department of Labor. Although the parties recently filed an agreement for dismissal, the Second Circuit has not yet dismissed the appeal.

5. Congress recognized in the legislative history of ERISA § 408(b) (3) that transactions involving leveraged ESOPs raise potential problems, and accordingly directed the Department of Labor and the Internal Revenue Service to give such transactions "special scrutiny" to ensure that they are primarily for the benefit of ESOP participants and beneficiaries:

> Although these transactions normally are for the benefit of plan participants and beneficiaries, the conferees recognize that there may be potential problems. For example, the interest rate should not be too high and the purchase price of the stock from the party-in-interest should not be too high, so that plan assets might be drained off. Also, the terms of the note between the party-in-interest and the plan should not allow the party-in-interest to call the note at his convenience, which might put undue financial strain on the plan. Because of such potential problems, the conferees

> intend that all aspects of these transactions will be subject to special scrutiny by the Department of Labor and Internal Revenue Service to ensure that they are primarily for the benefit of plan participants and beneficiaries.

H.R. Rep. No. 1280, 93rd Cong., 2d Sess. (1974) at 313, reprinted in 1974 U.S. Code Cong. & Admin. News 5038, 5093 (emphasis added).

6. The appellant has just filed a Petition for Rehearing and/or Rehearing En Banc. The Secretary needs additional time to review the record and, if appropriate, to prepare a brief. The Secretary first learned of the Court's decision in this matter on September 18, 1994. The Secretary has not yet received a complete set of the briefs filed before the Court, and has not yet received or reviewed the record or any evidence in the case.

7. Appropriate clearance must be obtained prior to the Secretary's filing of a brief amicus curiae. The procedure for obtaining such clearance, which includes the authorization of the Solicitor General of the United States (28 C.F.R. § 0.20(c)), cannot be completed by the current deadline, which the undersigned attorneys understand to be September 28, 1994.

8. The additional time requested by the Secretary will not appreciably delay the final resolution of the case or prejudice the parties.

Wherefore, the Secretary respectfully requests that the court enlarge until the 11th of November, 1994, the time within which the Secretary may file a brief

amicus curiae, and that the Court grant such other relief as seems proper.

Dated: September 27, 1994

Respectfully submitted,

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

MARC I. MACHIZ
Associate Solicitor
Plan Benefits Security Division

KAREN L. HANDORF
Counsel for Special Litigation

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Attorneys
U.S. Department of Labor office of the Solicitor
Plan Benefits Security Division
P.O. Box 1914
Washington, D.C. 20013
(202) 219-7923

## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September 1994, true and correct copies of the foregoing:

> MOTION OF THE SECRETARY OF LABOR FOR ENLARGEMENT OF TIME IN WHICH TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

were mailed by first class United States mail, postage prepaid, to counsel at the addresses set forth below:

Alfred D. Ellis
Cherwin & Glickman
One International Place
Boston, MA 02110
Attorney for Plaintiff-Appellant

Jeffrey B. Rudman
Hale & Dorr
60 State Street
Boston, MA 02109

Attorney for Defendants-Appellees

_____
TIMOTHY HAUSER

**UNITED STATES COURT OF APPEALS**

**FOR THE FIRST CIRCUIT**

No. 93-2241

PETER A. CRAWFORD

Plaintiff - Appellant

V.

CHARLES R. LAMANTIA, ET AL.,

Defendants - Appellees

Before

BOWNES, Senior Circuit Judge

and STAHL, Circuit Judge

**ORDER OF COURT**

Entered: November 1, 1994

Upon consideration of the "Motion of the Secretary of Labor For Enlargement of Time in Which to File a Brief Amicus

Curiae in Support of Petition For Rehearing",.

It is ordered that said motion be denied.

**By the Court:**

_____
Clerk

CC: James J. Dillon, Esq.
Jeffrey B. Rudman, Esq.
Peter J. Macdonald, Esq.
Alfred D. Ellis, Esq.
Timothy Hauser, Esq.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

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No. 93-2241

PETER A. CRAWFORD,

Plaintiff, Appellant,

v.

CHARLES R. LAMANTIA, ET AL.,

Defendants, Appellees.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, U.S. District Judge]

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**ERRATA SHEET**

Add the following sentence to the end of footnote 6 on page 11:

Additionally, unlike the situation in Reich v. Valley Nat. Bank of Arizona, 837 F. Supp. 1259 (S.D.N.Y. 1993), where the funding of the ESOP drove the company into bankruptcy, no adverse economic effect stemming from the overvaluation was alleged here, and thus that issue is not before us.

**UNITED STATES COURT OF APPEALS**

**FOR THE FIRST CIRCUIT**

No. 93-2241

PETER A. CRAWFORD,

Plaintiff - Appellant

V.

CHARLES R. LAMANTIA, ET AL.,

Defendants - Appellees

TORRUELLA, Chief Judge,

BOWNES, Senior Circuit Judge,

SELYA, CYR, BOUDIN and STAHL,

Circuit Judges.

**ORDER OF COURT**

Entered: November 29, 1994

The panel of judges that rendered the decision in this case having voted to deny

the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

**By the Court:**

_____
Clerk

cc: James J. Dillon, Esq.
Jeffrey B. Rudman, Esq.
Peter J. Macdonald, Esq.
Alfred D. Ellis, Esq.

Direct Recipients:
James J. Dillon, Esq.
Jeffrey B. Rudman, Esq.
Peter J. Macdonald, Esq.
Alfred D. Ellis, Esq.

41435.1

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MASSACHUSETTS**

**C.A. No. 89-1038 WF**

| | |
|---|---|
| **PETER A. CRAWFORD,** | ) |
| | ) |
| **Plaintiff** | ) |
| **v.** | ) |
| | ) |
| **PAUL D. LITTLEFIELD, IRVING H. PLOTKIN AND HARLAND A. RIKER, JR., individually and in their official capacities as Trustees of the ARTHUR D. LITTLE, INC. EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,** | ) |
| | ) |
| **Defendants** | ) |

**AMENDED COMPLAINT**

**Introduction**

This is an action under the Employee Retirement Income Security Act ("ERISA") seeking recovery of losses suffered by the Arthur D. Little Employee Stock Ownership Plan (ESOP). This action arises out of the purchase by the Trustees of the ESOP

of 546,520 shares of Arthur D. Little (ADL) common stock at a purchase price of $60 per share. This suit seeks recovery on behalf of the ESOP from the Trustees of the ESOP for breach of fiduciary duty for the Trustees' failure to act for the exclusive benefit of the participants and beneficiaries of the ESOP plan, ERISA 404(a),(A), by purchasing the stock of ADL on behalf of the ESOP in excess of its fair market value. This suit seeks the recovery for the ESOP of that excess payment made by the ESOP Trustees for the ADL stock, plus attorneys fees and costs.

**Jurisdiction**

(1) Plaintiff invokes the court's jurisdiction pursuant to 29 U.S.C. § 1132(e) [ERISA § 502(e)] and 28 U.S.C. § 1331.

**Parties**

(2) Plaintiff Peter A. Crawford ("Crawford" or "Plaintiff") is an individual residing at Boston, MA at the time the suit was filed. Presently, the Plaintiff is a resident of Scottsdale, AZ. Plaintiff was an employee at ADL from 1980 until May 26, 1989 and a participant in the ADL ESOP at all relevant times.

(3) Defendants Paul D. Littlefield, Irving H. Plotkin and Harland A. Riker, Jr. (collectively referred to as the "Trustees") are individuals and employees of ADL who serve as Trustees of the Arthur D. Little, Inc. Employee Stock Ownership Plan and Trust ("ESOP").

**Class Action Allegations**

(4) The above-named Plaintiff brings this action on his own behalf and on

behalf of all other individuals who are similarly situated; i.e., who were employees of ADL at the time the ESOP purchased the stock from ADL and who met the eligibility requirements for participation in the ESOP. Those individuals constituting the class are so numerous as to make it impractical to join all members of the class of Plaintiffs.

(5) There are questions of law and fact which are common to all members of the class. Furthermore, the questions of law and fact common to the class members predominate over any question affecting any individual class members. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(6) The person named as a representative Plaintiff will fairly and adequately protect the interests of all class members in the prosecution of this action and in the administration of all matters relating to claims stated herein.

**Allegations Common to all Counts**

(7) On July 13, 1987, Plenum Publishing Corporation ("Plenum") made an unsolicited offer to purchase the controlling ADL shares which at that time were held by the Memorial Drive Trust ("MDT"), for $50 per share. Upon information and belief, the Trustees of the MDT at that time were all employees of ADL. On July 24, 1987, the Board of Directors of ADL unanimously rejected the offer. On July 30, 1987, the MDT Trustees unanimously rejected the offer.

(8) On August 14, 1987, Plenum increased its offer to the MDT to $55 in cash per share. On September 17, 1987, the MDT Trustees unanimously rejected the revised Plenum offer. On September 23, 1987, Plenum announced that it was abandoning its efforts to acquire ADL. Upon information and belief, the Plenum offer was based on the assumption that it would gain control of ADL. Plenum was therefore prepared to pay a control premium.

(9) Following the withdrawal of the Plenum offer, the quoted price of ADL common stock declined from approximately $45 per share to approximately $30 per share. On March 15, 1988, the price prevailing on NASDAQ, and quoted by independent persons, was $33 per share.

At that time, approximately twenty-five (25%) percent of the ADL common shares was held by the public.

(10) On March 16, 1988, ADL announced that it was considering a management proposal to form an ESOP to acquire all shares not currently owned by the MDT at a price of $57 per share. On March 19, 1988, it was announced that the Board of Directors of ADL and the MDT Trustees had approved the above mentioned acquisition of shares at $60 per share.

(11) Upon information and belief, the $60 transaction price and the proposed $57 transaction price, were determined largely by the requirement to exceed the earlier Plenum offer, and exceeded the fair market value of a minority interest in ADL stock determined by the public market. Upon

information and belief, if the transaction price had not exceeded the earlier Plenum offer, the MDT Trustees, the ADL Board of Directors and ADL management would have been potentially liable to the minority public shareholders of ADL and the MDT participants for breach of fiduciary responsibility for rejecting the Plenum offer. By accomplishing the transaction at a higher price, this potential liability has been removed.

(12) On June 13, 1988, Plaintiff Crawford, through his attorney, caused a letter accompanied by two memoranda (the "Memoranda") (copies of the memoranda attached hereto and incorporated herein as Exhibit "A") alleging that the proposed transaction was for an excessive price, and thus in violation of ERISA, to be

delivered to attorneys for the ESOP, the MDT, and ADL. At that time, Crawford was an employee of ADL and a member of the Arthur D. Little Employee Investment Plan ("EIP"), ADL's then employee stock ownership plan. Under ADL's management proposal to form an ESOP, all the ADL shares held by EIP would be transferred to the ESOP. The Memoranda further noted that the effects of dilution and debt resulting from the transfer of shares to the ESOP and from ADL borrowing approximately $32 million to purchase the ADL stock would lower the value of the shares. The accompanying letter demanded that the transaction be delayed until truly independent trustees could be appointed for the ESOP, and threatened to seek an injunction to have the transaction

set aside should it be completed (Exhibit "A"). Upon information and belief, Defendant Trustees took no action on Plaintiff's letter and the memorandum.

(13) On June 14, 1988, ADL purchased all Old Shares not held by the MDT or ESOP from the public, and exchanged each Old Share held by the MDT into 1.0567605 New Shares. ADL borrowed approximately $32 million from Citicorp, N.A. and the First National Bank of Boston to finance this purchase. Each New Share is substantially equivalent to .946288 Old Shares. The Old Shares have thus ceased to exist. This resulted in a dilution of value for each share. At the same time, on June 14, 1988, the ESOP purchased 546,520 New Shares from ADL at a price of $60 per share, for a total consideration paid of

$32,791,200. The ESOP borrowed $32,791,200 from ADL to finance this transaction. This purchase, and related activities will hereinafter be referred to as "the Transaction."

(13.5) Upon information and belief, as the Trustees of the ESOP purchased the New Shares which were equivalent to .946288 old shares, the ESOP should have only paid (.946288) x $32,791,200 or $31,029,919. The difference of $1,761,281 between the appraised value $60 per share and the (.946288) $60 per share for the diluted shares paid by the Trustees of the ESOP constitute excess consideration paid for the New ADL Shares.

(14) Upon information and belief, Defendant Trustees of the ESOP failed to negotiate with ADL concerning (1) the

diluted value of shares purchased by the ESOP as a result of 5.68% stock dividend granted to the MDT and (2) accounting for the debt charges for financing the ADL stock purchase from the public shareholders which would lower ADL's projected earnings thus reducing the value of the ADL shares.

(15) Upon information and belief, the Defendant Trustees of the ESOP were aware of the precise effects of dilution and debt associated with the transaction prior to its completion on June 14, 1988, but nevertheless judged the transaction price of $60 to be "not in excess of adequate consideration within the meaning of" 29 U.S.C. § 1002(18) [ERISA § 3(18)].

(16) On September 19, 1988, in a communication to the ESOP participants,

the ESOP Trustees indicated that they, with the advice of Brian M. Freeman & Co., Inc. ("Freeman"), had valued the ADL stock held by the ESOP at $54 per New Share, as of June 30, 1988, two weeks after the ESOP purchased these shares for $60. The communication noted that were it not for the effects of dilution and debt associated with the ESOP, the shares would have been valued at the transaction price of $60 per share. (See Exhibit "B" attached hereto and made a part hereof).

(17) On September 19, 1988, in a memorandum to the ADL staff, it was revealed that the MDT Trustees had valued the ADL shares at $54 per New Share as of June 30, 1988.

(18) In a proxy statement dated May 11, 1988, provided by John F. Magee,

director of ADL, to ADL shareholders and filed with the Securities Exchange Commission, ADL's net income for 1988 was projected to be $5-6 million. According to an Annual Report dated March 1989, provided to the staff of ADL, the company suffered a net loss during 1988 of $4.6 million.

(19) Upon information and belief, of the above $10.2 million difference, only $5.2 million is attributable to transaction costs and interest payments associated with the ESOP.

(20) Upon information and belief, a large portion of the remaining shortfall is associated with poor performance and the close down of Arthur D. Little Valuation ("ADLV"), a wholly-owned subsidiary of the company.

(21) In a communication dated March 1989 to the ESOP participants, the ESOP Trustees indicated that they, with the advice of Freeman, had valued the ADL stock at $52 per share as of December 31, 1988. (see Exhibit "C" attached hereto and made a part hereof. The primary reason cited for the continuing reduction in value was the losses at ADLV.

(22) Upon information and belief, the ADL employees and participants in the ESOP had little if any voice in either the decision to form an ESOP, or its terms.

**As and for a First Cause of Action Against the ESOP Trustees**

**(Engaging in a prohibited transaction under ERISA)**

(23) The allegations of paragraphs 1-22 are incorporated herein by reference as if they were specifically set forth.

(24) Arthur D. Little, Inc. (ADL), was a party in interest, as defined by 29 U.S.C. § 1002(14)(C) [ERISA § 3(14)(C)I, in the purchase of ADL shares by the ESOP on June 14, 1988.]

(25) Upon information and belief, the ESOP Trustees are participants in the MDT, and employees of ADL. Defendant Trustees are not independent Trustees as set forth in I.R.S. proposed Regulation 29 CFR part 2510,3-18(b)(3)(iii).

(26) Prior to the transaction on June 14, 1988, Defendant Littlefield was a beneficial owner of 2088 shares of ADL stock. As a result of the transaction, he received $125,280 for those shares. In

addition, each of the ESOP Trustees had indeterminate beneficial interests in the ADL shares held by the MDT. Defendant Trustees are not independent Trustees as set forth in I.R.S. proposed Regulation 29 CFR part 2510,3-18(b)(3)(iii).

(27) Because of the inherent conflicts of interest, the ESOP Trustees are not truly independent, and the burden rests upon them to prove that the $60 transaction price did not exceed adequate consideration, and they have not done so.

(28) Adequate consideration, as defined by 29 U.S.C. § 1002(18) ERISA § 3(18)], for the minority shares purchased by the ESOP on June 14, 1988 was determined by the public market price, and was no more than $33 per Old Share, or $31.23 per New Share.

(29) The sale of stock by ADL to the ESOP violated 29 U.S.C. § 1106(a), [ERISA § 406(a)], since the exemption of 29 U.S.C. § 1108(e)(1) [ERISA § 408(e)(1)] for adequate consideration was not satisfied.

(30) Upon information and belief, Defendant ESOP Trustees knew, or should have known, that adequate consideration for the ADL shares being purchased by the ESOP on June 14, 1988 was less than $60 per New Share. They acted in bad faith by approving the purchase of ADL shares at an excessive price.

(31) Upon information and belief, neither the purchase of ADL shares by the ESOP, nor the loan made by ADL to the ESOP for the purpose of purchasing these shares, was solely in the interest of the

ESOP, nor primarily for the benefit of, the ESOP participants, all in violation of 29 U.S.C. § 1104(a)(1) ERISA § 404(a)(1)]. Upon information and belief, the primary purpose of the ESOP Trustees were to entrench the existing ADL management and gain control of ADL and to exculpate them from potential liability for breach of fiduciary responsibility resulting from the rejection of the Plenum offer.

(32) The loaning of money from ADL to the ESOP violated 29 U.S.C. § 1106(a)(1)(B) [ERISA §406(a)(1)(B)], since the exemption of 29 U.S.C. § 1108(b)(3)(A) [ERISA § 408(b)(3)(A)] for loans primarily benefiting participants was not met.

(33) Therefore, Defendant ESOP Trustees are liable for breach of fiduciary responsibility pursuant to 29

U.S.C. § 1109(a) [ERISA § 409(a)] for breach by a co-fiduciary pursuant to 29 U.S.C. § 1105(a) [ERISA § 405(a)]. They are liable pursuant to 29 U.S.C. § 1109(a) [ERISA § 409(a)] to make good the losses suffered by the ESOP, for attorneys fees and costs, and for removal as Trustees.

**As and for a Second Cause of Action Against the ESOP Trustees**

**(Breach of fiduciary duty of care)**

(34) The allegations of paragraphs 1-35 are incorporated herein by reference.

(35) Upon information and belief, the valuation of ADL shares by Freeman was based largely upon optimistic projections of the future financial performance of ADL provided by officers of ADL.

(36) Upon information and belief, prior to the purchase by the ESOP of ADL

shares, the ESOP Trustees failed adequately to investigate the current and likely future financial performance of ADL.

(37) Upon information and belief, the ESOP Trustees depended excessively upon the Freeman valuation, which failed to apply proper valuation principles in its analysis. Specifically, it failed adequately to consider the prices of similar transactions and the values of similar publicly-held companies, it failed to consider the effects of dilution and debt service associated with the purchase of the ADL shares by the ESOP, and it erroneously included the value of unused real estate. It failed to recognize that, under ERISA, the value of the ADL shares

was to be determined solely by the public market price.

(38) Upon information and belief, the ESOP Trustees were not involved in negotiations regarding the price at which the ESOP would purchase the ADL shares.

(39) Therefore, the ESOP Trustees breached their fiduciary and co-fiduciary duties of care pursuant to 29 U.S.C. § 1104(a)(1)(B) [ERISA § 404(a)(1)(B)] and 29 U.S.C. § 1105(a) [ERISA § 405(a)] by failing to act with the care, skill, prudence, and diligence of prudent men. They are therefore liable under 29 U.S.C. § 1109(a) [ERISA § 409(a)] for damages for breach of fiduciary duty, and negligence, and must restore to the ESOP the losses resulting therefrom, for attorneys fees

and costs, and are subject to removal as Trustees.

WHEREFORE, the Plaintiff prays that the Court:

(i) Enter judgment against the Defendants on Count I in an amount equal to all losses suffered by the ESOP as a result of the excess price paid by the ESOP for the ADL stock on or about June 14, 1988 to be determined at trial; and

(ii) Enter judgment against the Defendants on Count II in an amount equal to all losses suffered by the ESOP as a result of the Defendants' breach of fiduciary duty to all Participants and beneficiaries

of the ESOP, to be determined at trial; and

(iii) Enter a preliminary and a permanent injunction removing the Defendants from their capacity as Trustees of the ESOP and an Order permitting the ESOP participants to elect ESOP Trustees of their own choice; and

(iv) Award Plaintiff costs and attorneys fees as provided by 29 U.S.C. § 1132(g)(1) [ERISA § 502(g)(1)].

(v) Grant Plaintiff such additional relief at the Court deems just.

Alfred D. Ellis, Esquire
BBO # 153280
CHERWIN & GLICKMAN
One International Place
Boston, MA 02110
Tel. (617) 330-1625

Dated: _____

CERTIFICATE OF SERVICE

I, Alfred D. Ellis, hereby certify that on this 10th day of June, 1993, I served a copy of the within Amended Complaint by first-class mail, postage prepaid to:

James J. Dillon, Esquire
Goodwin, Procter & Hoar
Exchange Place
Boston, MA 02109-2881

_____
Alfred D. Ellis

**WILLAMETTE MANAGEMENT ASSOCIATES**
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July 6, 1993

Alfred D. Ellis, Esq.
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Dear Mr. Ellis:

You have requested that I review the March 25, 1988 Brian M. Freeman & Co., Inc. report to the Trustees of the Arthur D. Little, Inc. Employee Stock Ownership Plan (the "Freeman Report"). Except as otherwise noted, all capitalized terms shall take the meaning as described in the June 14, 1988 Arthur D. Little, Inc. Proxy Statement. Based upon my review, I have found several significant procedural and conceptual errors. These relate directly to:

i. The ESOP paying a control premium for a minority interest in the Company; and

ii. Failure of the Freeman Report to adequately take into consideration the dilution associated with the shares of the MDT Sub and the shares of the ESOP Sub being converted into 1.057 shares of New Common Stock; and the MDT Put that would allow the MDT to sell to the Company up to 250,000 shares of Common Stock at a price equal to the price to be paid in the merger or, if greater, the then fair market value of the stock; and

iii. The Freeman Report inappropriately took into consideration the value of certain assets of the Company.

**Control Premium**

In connection with the merger, the ESOP acquired 546,520 New Shares from the Company, or approximately 21.6% of the Company's New Shares, at a price of $60 per share (the "ESOP Transaction"). This clearly is a minority interest position in the Company and even when combined with the ESOP's existing ownership position of 99,197 New Shares, the ESOP owned a minority position of approximately 25.5% of the Company's New Shares.

The Freeman Report's justifications for the ESOP paying a control premium are less than compelling. In essence, the Freeman

Report asserts that the terms and other circumstances of the purchase by the ESOP eliminate the need to apply minority discounts. These terms and circumstances include, but are not limited to, the following:

i. The right of the ESOP to sell its shares to a third party on the same basis as the MDT, assuming that the ESOP would receive the same premium as the MDT upon sale of all or a portion of the Company; and

ii. The power of the Trustee to select an independent appraiser to value the shares held by the ESOP, and thereby assures that the shares, for the purposes of the put rights, will be valued

on a basis consistent with the methodologies to value the share for purposes of the acquisition (i.e., a control value); and

iii. The fact that the interested two sets of shareholders (the MDT and the ESOP) are not divergent such that the MDT could be expected to exercise its controlling interest to the detriment of the ESOP.

This is tantamount to suggesting that since the MDT is a friendly shareholder and the ESOP has a put right at a controlling interest fair market value, that it is acceptable for the ESOP to pay a control premium for a minority position in the Company. The Freeman Report does not address the fact that the ESOP did not

acquire the attendant rights or benefits of a control shareholder. Investors are willing to pay a premium for a controlling interest in a company because of the rights and benefits that accrue to control shareholders. These include the right to affect corporate policy and strategy, dispose of assets or operations of the company, influence organizational structure, establish compensation systems, and many more perquisites of control. Investors simply do not pay a control premium for a minority interest in a company because the shares have a put right at a control interest.

The ESOP's purchase is not analogous to a situation in which there are several minority shareholders which purchase a controlling interest or 100% of a company.

A seller will not differentiate between selling his or her control interest to a single investor or group of investors. Therefore, situations arise whereby an investor group will purchase a controlling interest and no single investor will have a controlling interest in the company. It is common in this type of transaction, that the investor group have buy-sell agreements that provide for individual investors to sell their shares at a controlling interest price. In the case of the ESOP Transaction, the ESOP is not part of an investor group purchasing a controlling interest, but is merely a minority shareholder purchasing a minority interest in the Company. Even though the MDT and the ESOP may have similar interests in the Company, they are two

separate and distinct entities with different shareholder groups, and therefore, must not be considered as a single investor.

**Dilution**

The Freeman Report does not fully and adequately address the dilutionary impact of the merger on the ESOP. As a consequence of the merger, 4% of the New Shares will be transferred by the Company to the MDT as consideration for the impact on the value of the shares held by the MDT resulting from the ESOP's participation in the merger. This is comparable to issuing the MDT a stock dividend equal to 4% of the value of the Company. This results in a 4% diminution of the equity interest of the ESOP immediately following the merger. Therefore, if the intrinsic value of the

Common Stock is $60 per share, the ESOP will be receiving New Shares worth only $57.60 per share ($60 - .04 x 60 = $57.60), due to the dilution. In other words, the ESOP is paying $60 per share for a security worth $57.60 per share. This is in fact confirmed in the September 1988 Vol. I No. 2 Employee-Owner Update. The Update specifically addresses the decline in value of the New Shares from June 14, 1988 to June 30, 1988: "The transaction, however, provided a stock dividend for those shares rolled over from the Employees' Investment Plan to the ESOP as well as the shares held by Memorial Drive Trust. The dilution, as a result of this stock dividend, reduced the value to approximately $57 a share." Therefore, the Trustees admit that dilution was not

properly considered in arriving at the value of the ESOP's New Shares, and that the ESOP paid $60 per share for securities worth approximately $57 per share. Since the Trustees engaged the Brian M. Freeman Co., Inc. to perform the June 30, 1988 valuation update, the Freeman firm was fully aware of the dilutive impact of the merger which they erroneously failed to take into account in their fairness opinion to the Trustees.

The Freeman Report does not take into consideration the potential dilution associated with the MDT being granted an option to put 250,000 share of New Common Stock to the Company at a price equal to the greater of the merger price or the then fair market value. As indicated in the above example, the merger will result

in a 4% dilution in the value of the New Common Stock. If the true value of the New Shares is $57.60 per share the MDT put option will allow the MDT to put its shares at $60 per share, or $2.40 above the fair market value. This will further dilute the value of the New Shares by approximately $.25.

**Other Assets**

The Freeman Report erred in its inclusion of certain of the Company's assets in its valuation of the New Shares. A minority shareholder cannot force the sale or liquidation of assets of a company and thereby realize any value other than the company's going concern value. In deriving the pretransaction value per share, The Freeman Report added the realizable value of certain assets in

excess of the going concern value to the share prices determined by the discounted cash flow and market multiple methodologies. Accordingly, the ESOP is inappropriately paying for value which it will not be able to realize (i.e., the excess realizable value of other assets). The position taken by the Freeman Report is contrary to the Foltz v. U.S. News decision. The court recognized that "any realizable value should be attributed to the real estate only "if it was evident that the controlling interest had a firm and clear intent to dispose of the real estate within a very short or reasonable period of time [, that is,] absolute evidence .... not mere development of plans." As indicated in the Lazard Opinion

discussed below, the MDT did not intend to sell its control interest in ADL.

**Reasonableness of Projections**

At the time of my review, I was not provided with the financial projections relied upon by Brian M. Freeman & Co., Inc. in performing their analysis. Accordingly, I cannot and do not attest as to the reasonableness of the financial projections, nor the conclusions arrived at based on the projections. If provided to me, I will review the projections and supplement my findings as necessary at a later date.

**Conclusion**

The Freeman Report was significantly flawed in three major respects: allowing the ESOP to pay a control price for a minority interest position in the Company;

inadequately taking into consideration the effects of dilution on the New Share value; and inappropriately adding the excess realizable value of certain assets to the fair market value of the Common Stock of the Company, a value which the ESOP could never realize.

The March 25, 1988 Brian M. Freeman & Co., Inc. Opinion to the Trustees of the Arthur D. Little, Inc. Employee Stock Ownership Plan As Appended to the June 14, 1988 Arthur D. Little Proxy As Annexed states that they had reviewed the "Opinion to the Board of Directors concerning the fairness of the merger to the public shareholders by Lazard, Freres & Co., dated the date thereof." The Lazard Opinion As Appended to the June 14, 1988 Arthur D. Little Proxy As Annexed states: "We believe the

offer price is higher than the price that would be obtained, under existing circumstances, from an independent third party for the publicly-held shares of ADL, whether such shares were sold as a single block or in market transactions." This appears to be a clear violation of fair market value as promulgated by the Department of Labor's proposed regulation 2510.3-18(b)(2)(i) which defines fair market value "as the price at which an asset would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, and both parties are able, as well as willing, to trade and are well-informed about the asset and the market for that asset."

The Lazard Opinion further states: "We also considered the possibility that public shareholders might achieve the price that would result if ADL were to be sold as an entirety; in this regard, we noted that the MDT, which holds the majority equity position in ADL, does not intend to dispose of its interest." There appears to be no intent by the MDT to realize the excess realized value associated with certain other assets in a sales transaction. It is therefore inappropriate for the ESOP to pay for this excess realized value.

The Freeman Report does not offer sufficient evidence that the ESOP did not pay more than adequate consideration for the New Shares. This is further confirmed by The Lazard Opinion which states that

"We believe the offer price is higher than the price that would be obtained, under existing circumstances, from an independent third party for the publicly-held shares of ADL, whether such shares were sold as a single block or in market transactions." If the ESOP paid more for its New Shares than any other independent third party would have paid, then surely they paid more than fair market value, or adequate consideration for the New Shares.

Very truly yours,

Robert S. Socol

RSS:jm
Enclosure

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July 20, 1993

Alfred D. Ellis, Esq.
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Boston, MA 02110

Dear Mr. Ellis:

You have requested that I supplement my letter of July 6, 1993 to include the economic loss to the ESOP as a result of the ESOP Transaction. These economic losses relate to the following:

(i) the ESOP paying a control premium for a minority interest in the Company;

(ii) the dilution associated with the shares of the MDT Sub and the ESOP Sub being converted into 1.057 shares of New Common Stock and the MDT Put; and

(iii) The Freeman Report inappropriately adding the excess realizable value of other assets to the value otherwise determined by the discounted cash flow and market multiple methodologies.

Control premiums for individual transactions vary widely; however, the median control premiums have ranged from approximately 35% to 45% over prime. Assuming that the actual control premium used in the ESOP Transaction was within the range of median control premiums, the fair market value of the New Shares, on a

minority interest basis, is likely to fall between the range of $40 to $45 per share. Accordingly, the ESOP purchased securities worth between $40 to $45 per share for $60 per share. This results in an economic loss or detriment to the ESOP of between $15 to $20 per share.

I have identified the dilutionary impact of the merger in my July 6, 1993 letter as approximately $2.65 per share. This figure was based on the intrinsic value of Common Stock being $60 per share. If the true intrinsic value of the Common Stock is between $40 to $45 per share, the dilutionary impact of the stock dividend and the MDT Put would be reduced proportionately to approximately $1.75 to $2.00 per share.

An economic loss was incurred by the ESOP because of The Freeman Report's inappropriate inclusion of the excess realizable value of certain of the Company's assets in its valuation of the New Shares. The magnitude of the economic loss is best approximated by the excess realizable value utilized by The Freeman Report. This excess realizable value ranged between $3.84 and $8.05 per share as delineated on page VII.1 of The Freeman Report.

As indicated above, the ESOP incurred substantial economic losses in purchasing the New Shares at $60 per share. I have estimated this loss to range from approximately $20.50 to $30 per share. These estimates are preliminary and I have not performed the requisite analysis to

provide you with a definitive range of economic loss incurred by the ESOP.

Very truly yours,

Robert S. Socol
Principal

RSS/IM

Supreme Court, U.S.
FILED
FEB 28 1995
OFFICE OF THE CLERK

(3)

No. 94-1302

# In the Supreme Court of the United States

OCTOBER TERM, 1994

PETER A. CRAWFORD,
PETITIONER,

*v.*

CHARLES R. LAMANTIA,
RESPONDENT.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in concluding that an individual former employee who (a) asserted no claim for improper termination, (b) is no longer a plan participant, (c) received all vested benefits when due (d) alleged no claim for vested benefits and (e) has no expectation of returning to covered employment, lacks standing under ERISA to prosecute a derivative claim on behalf of a plan.

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# In the
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OCTOBER TERM, 1994

No. 94-1302

PETER A. CRAWFORD,
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*v.*
CHARLES R. LAMANTIA,
RESPONDENT.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

## COUNTERSTATEMENT OF THE CASE

*Prior Proceedings and Factual Background.* Petitioner worked as a management consultant for Arthur D. Little, Inc. ("ADL") beginning in 1981. Petitioner's Appendix at 26a ("P.A."). While he was an employee of ADL, the petitioner was a beneficiary of the Arthur D. Little Inc. Employee Stock Ownership Plan (the "ESOP"), which was formed in 1988 (P.A. 93a-95a).

The ESOP, upon its formation, obtained a $32.8 million loan from ADL to buy 546,520 "New Shares" of ADL at $60 per share (P.A. 28a). The purchased ADL shares were collateral for the loan from ADL, held in a suspense account. Each quarter, ADL contributed cash to the ESOP sufficient to pay principal and interest due on the seven-year term note (P.A. 28a). As the ESOP repaid its debt to ADL, a proportion of ADL shares in the

suspense account were freed from the collateral lien. These freed shares were then allocated, by formula, to individual accounts of participating ADL employees (P.A. 29a). In effect, ADL was agreeing to repay the loan it was making to the ESOP to fund the purchase of new shares, with the employees ultimately reaping the benefit (P.A. 29a).

In November 1988 ADL told petitioner that it was terminating his employment in connection with staff reductions due to business conditions (P.A. 50). More than five months after he was informed that his employment was being terminated, and after negotiated salary and benefit extensions expired, petitioner filed his original complaint asserting various statutory and common law claims against eleven defendants (P.A. 30a). Petitioner made no claim for wrongful termination nor did he assert that he was owed any vested benefits (P.A. 3a-4a). After he left ADL, Petitioner received various benefits that had vested under the ESOP on his behalf (P.A. 31a). Specifically, petitioner received a final distribution of vested benefits from the ESOP in the form (selected by petitioner) of a certificate for 47 shares of ADL stock and a check in the amount of $51.49 (P.A. 30a-31a). Petitioner brought no action disputing the propriety of the calculation and distribution of his vested benefits.

In 1993, while a summary judgment motion was pending, petitioner voluntarily proposed the dismissal, with prejudice, of all claims against all defendants (including, specifically, his former employer) except the three trustees of the ESOP (P.A. 30a). Petitioner then filed an amended complaint asserting two claims under the Employee Retirement Income Security Act of 1974 ("ERISA") against those three defendants in a purported class action that was, in fact, a claim on behalf of the ESOP. The amended complaint alleged that the ESOP Trustees overpaid for ADL stock and thus breached their fiduciary duty five years earlier (P.A. 3a). Again, the amended complaint made no claim that petitioner had been denied any vested benefits or that he was terminated to

deprive him of standing (P.A. 2a, 3a-4a). Petitioner sought relief only on a derivative basis, on behalf of the ESOP Plan, pursuant to ERISA §409(a), 29 U.S.C. §1109(a) (P.A.3a). The respondents renewed their motion for summary judgment.

On October 12, 1993 the District Court for the District of Massachusetts, Wolf, J., granted summary judgment (P.A. 21a) and judgment entered the same day (P.A. 22a). The District Court "note[d] that there is no claim in the amended complaint that the plaintiff is entitled to vested benefits." (P.A. 3a-4a). The District Court concluded that, because the petitioner was a former employee with no reasonable likelihood of a return to covered employment, and because he made no claim for vested benefits, he lacked standing to bring an ERISA claim on behalf of a plan under the principles enunciated in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1988).

As an alternative grounds for its decision, the District Court concluded that the petitioner failed to satisfy the requirements of Fed. R. Civ. P. 23.1 to bring a derivative claim on behalf of an ERISA plan (P.A. 16a). Specifically, the lower court concluded that the petitioner's claims "are not typical of the claims and defenses of the class." (P.A. 17a). The District Court also ruled that there were "economic antagonisms" between the petitioner and current participants in the ADL ESOP, and that, as a terminated employee, the petitioner "has a unique motive for bringing this case" that renders him atypical and inappropriate as a derivative plaintiff (P.A. 19a).

In affirming the grant of summary judgment, the Court of Appeals concluded that, even if petitioner possessed standing at the time the action was commenced under the principles of *Firestone*, "he lost this standing on account of having terminated his employment with ADL and having collected all vested benefits then due him under the ESOP." (P.A. 39a). In addition, the Court of Appeals held that the petitioner failed to demonstrate a colorable claim to vested benefits, a

conclusion amply supported by the lack of any such claim in either the original or the amended complaint (P.A. 40a).

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

### I. The Court Of Appeals Applied The Correct Legal Standard Under ERISA In Deciding The Standing Of A Former Plan Participant

Section 502 of ERISA, 29 U.S.C. §1132, identifies persons who may undertake various types of civil actions under ERISA. Actions contemplated under the statute include, *inter alia*, individual suits "to recover benefits due" (29 U.S.C. §1132(a)(1)(B) [ERISA §502(a)(1)(B)]) and actions on behalf of a benefit plan for breach of fiduciary duty (29 U.S.C §1132(a)(2) [ERISA §502(a)(2)], §1109 [ERISA §409]). A "participant" with standing to pursue such claims, includes "employees in . . . currently covered employment. . . ." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 117 (1988). The class of "participants" also includes "former employees who have a . . . reasonable expectation of returning to covered employment" or who have "a colorable claim to vested benefits." *Id.* (Citations omitted). The Court of Appeals properly applied this standard to the undisputed record facts before it.

#### A. *Petitioner Was Not A Current Employee*

Five months prior to commencing his action, petitioner was informed by his employer, ADL, that his employment was being terminated (P.A. 5a). Petitioner never asserted a wrongful termination claim against ADL (P.A. 2a). Petitioner claimed that, although he had ceased receiving salary after March 24, 1989 (P.A. 30a), he remained an employee by means of an "unpaid leave of absence" for ten days after he commenced this action on May 12, 1989 (P.A. 30a-31a). Both the District Court and the Court of Appeals assumed, without deciding, that the petitioner was an employee on the date suit was commenced, although the District Court noted that this assumption was questionable:

> Further consideration of the record after the August 16, 1993 hearing indicates that this assumption may not have been appropriate, and that the evidence may be insufficient, even when considered in the light most favorable to Crawford, to permit the reasonable inference that he was an employee of ADL when he initiated this action. Defendants contend, and plaintiff does not contest, that plaintiff was an employee-at-will at ADL. In November 1988, he was informed that he "would be better off elsewhere." Defendants assert that Crawford was formally terminated, and his salary cut off on March 24, 1989. Crawford claims that prior to March 24, 1989, he requested and received an unpaid leave of absence, which was extended until May 26, 1989. Crawford concedes, however, that he did not receive a salary during this leave. Notwithstanding the facts that Crawford continued to use his office and secretary from March to May, and received a bonus and partial medical insurance during this time period, the evidence that ADL terminated Crawford and cut off his salary more strongly indicates Crawford was no longer an employee after March 24, 1989.

(P.A. 5a-6a).

Whether petitioner remained an employee the day he filed suit was a factual issue that the Court of Appeals properly by-passed in reviewing the decision of the District Court. The Court of Appeals properly noted that "'standing, since it goes to the very power of the court to act, must exist at *all stages* of the proceeding, and not merely when the action is initiated or during an initial appeal.'" (P.A. 38a) *(quoting Sommers Drug Stores Co. Employee Profit Sharing* v. *Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989) (emphasis added by Court of Appeals). *See also Safir* v. *Dole*, 718 F.2d 475, 481 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984).

B. *Petitioner Had No Reasonable Prospect of a Return To Employment*

Petitioner never asserted a wrongful termination claim against his employer and, as the Court of Appeals noted, petitioner "has not claimed in his amended complaint that he was terminated improperly in order to deprive him of standing to initiate or maintain this action under 29 U.S.C. §1140" (P.A. 29a). The District Court also noted that, on the record before the court, "plaintiff is not claiming that he has a reasonable expectation of returning to employment" (P.A. 2a).

C. *Petitioner Made No Colorable Claim For Vested Benefits*

The amended complaint sought no vested benefits (P.A. 63a-88a). The District Court noted this undisputed fact: "Finally, the court notes that there is no claim in the amended complaint that the plaintiff is entitled to vested benefits." (P.A. 3a-4a). Neither the word "vested" nor the term "vested benefit" appear anywhere in the amended complaint (P.A. 63a-88a). Instead, the amended complaint stated: "This is an action under the Employee Retirement Income Security Act ("ERISA") seeking recovery of losses suffered *by the Arthur D. Little Employee Stock Ownership Plan* ("ESOP") (P.A. 63a) (emphasis added). The District Court correctly noted that recovery on behalf of a plan is not a claim for vested benefits under a plan:

> [G]enerally, a damage claim on behalf of an ERISA plan is not a benefit claim.... The recovery sought by the amended complaint will go to the ESOP. There is no clear obligation of the ESOP to pay the plaintiff any more. The recovery will not directly affect payment to him, nor is there any ascertained amount that he would be paid if he were allowed to maintain this action and prevailed.

(P.A. 11a) (citation omitted).

Here petitioner met none of the requirements to establish standing under ERISA to assert a claim for breach of fiduciary duty on behalf of a plan. Absent a claim that an employee was induced to accept benefits and forego other benefits by misrepresentations of an employer, former employees who have received a lump-sum payment of all vested benefits have no standing to assert violations of ERISA. *Mitchell* v. *Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, 498 U.S. 898 (1990); *Teagardener* v. *Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 948 (6th Cir. 1990), *cert. denied*, 498 U.S. 1027 (1991).

## II. The Issues Presented By Petitioner Do Not Warrant Review In This Case

### A. *The Petition Presents No Conflict Among The Circuits*

The decision below does not conflict with decisions in other circuits. Other circuits have reached the same conclusion reached by the First Circuit — former employees with no expectation of returning to covered employment and who make no claim for vested benefits are not participants under ERISA and, therefore, lack standing to bring claims on behalf of an ERISA plan. *See e.g. Shawley* v. *Bethlehem Steel Corp.*, 989 F.2d 652, 659 (3d Cir. 1993) (holding that former employees "were not participants in an ERISA plan because they had neither a colorable claim to vested benefits nor a reasonable expectation of reemployment" and therefore lacked standing); *Yancy* v. *American Petrofina, Inc.*, 768 F.2d 707, 708 (5th Cir. 1985) (definition of participant "excludes retirees who have accepted the payment to them of everything owed to them in a lump sum, because these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments.") *(quoting Joseph* v. *New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir. 1985)); *Teagardener* v. *Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 948

(6th Cir. 1990), *cert. denied*, 498 U.S. 1027 (1991) ("plaintiffs were no longer participants, since they received *all benefits* that they were due under the Plan *at the time their participation in the Plan terminated*. . . ."); *Kuntz* v. *Reese*, 785 F.2d 1410 (9th Cir.) *cert. denied*, 479 U.S. 916 (1986) ("Former employees who have neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits" lack standing); *Mitchell* v. *Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, 498 U.S. 898 (1990) (participant "excludes . . . former employees who have received a lump-sum payment of their vested benefits. . . ."); *Raymond* v. *Mobil Oil Corp.*, 983 F.2d 1528, 1535 (10th Cir.), *cert. denied*, ____ U.S. ____, 114 S.Ct. 81 (1993) (same).

Furthermore, petitioner's argument that the panel's decision in this case is at variance with the First Circuit's own decision in *Vartanian* v. *Monsanto*, 14 F.3d 697 (1st Cir. 1994) misreads both the decision in *Vartanian* and the decision here.[1] The facts and issues in *Vartanian* were substantially different than those raised in *Crawford* v. *LaMantia*, 34 F.3d 28 (1st Cir. 1994), a point noted in the opinion of the Crawford panel (P.A. 45a). *Id.* 34 F.3d at 33, n. 7 ("[W]e note that *Vartanian* did not involve a situation, as here, where the plaintiffs could not 'establish that they were former employees with a colorable claim to vested benefits' when faced with a motion for summary judgment. Accordingly, *Vartanian* is inapposite.") *(citation omitted)*. Specifically, in *Vartanian* the plaintiff alleged that plan administrators induced him to retire by misrepresenting their intent about future plan modifications under consideration. 14 F.3d at 699. No such element was alleged by the petitioner, who was terminated and made no claim later that the termination was improper, deceptive or illegal. *See e.g.*, P.A. 29a, *Crawford*, 34 F.3d at 30 n.2

[1] The likelihood that the panel misconstrued *Vartanian* is also diminished given that one of the two judges issuing the decision in *Crawford* was a member of the unanimous panel in *Vartanian*.

("Plaintiff has not claimed in his amended complaint that he was terminated improperly in order to deprive him of standing to initiate or maintain this action under 29 U.S.C. §1140.")

Moreover, the plaintiff in *Vartanian* sought individual benefits under §502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B), which creates a mechanism by which an individual participant may recover "benefits due him under the terms of his plan. . . ." 14 F.3d at 701. Petitioner sought no relief under this section (because he sought no vested benefits) but relied on §502(a)(2) of ERISA, 29 U.S.C. §1132(a)(2), which authorizes actions to recover damages on behalf *of a plan* under Section 409 of ERISA, 29 U.S.C. §1109. Such claims are derivative and fundamentally different from the individual claim made in *Vartanian*. *See infra* at 16.

Petitioner's further argument that the decision of the Court of Appeals is at odds with *Gollust* v. *Mendell*, 501 U.S. 115 (1991) incorrectly reads the decision in *Gollust*. That case addressed the narrow issue of who may initiate an action under Section 16(b) of the Securities Exchange Act of 1934 15 U.S.C. §78p(b). *Gollust* addressed no ERISA issue nor did it interpret Fed.R.Civ.P. 23.1. 501 U.S. at 120-21. *Gollust* analyzed the text of §16(b) and Congress' remedial intent in enacting the statute, holding that Congress did not intend to impose a continuous ownership requirement on plaintiffs suing under §16(b). *Id.* at 121-24. The Court did note, however, that a plaintiff in a §16(b) action must maintain some stake in the case (a requirement petitioner here fails to meet):

> This is not to say, of course, that a §16(b) action could be maintained by someone who is subsequently divested of any interest in the outcome of the litigation. . . . there would be serious constitutional doubt whether that

> plaintiff could demonstrate the standing required by Article III's case or controversy limitation on federal court jurisdiction.

*Id.* at 124-25. Petitioner's departure from the plan, receipt of all vested benefits, and his decision not to challenge his termination divested him "of any interest in the outcome of the litigation".

Petitioner also misplaces reliance on *Sommers Drug Stores Emp. Profit Sharing Trust* v. *Corrigan*, 883 F.2d 345 (5th Cir. 1989), as he did before the Court of Appeals, to claim that recovery by a plan may be tantamount to recovery of vested benefits. Petitioners Brief at 8. *Sommers*, however, addresses the special circumstances arising when a plan is liquidated, and all of its assets are distributed to the beneficiaries. 883 F.2d at 347, 350 ("It must be remembered that the stock was sold as a step in a planned liquidation of the Trust with distribution to the class"). The *Sommers* plaintiffs' allegation of undervaluing plan assets, combined with the liquidation and payout of the undervalued plan assets, demonstrated that the class sought vested benefits. *Id.* at 349-50. Moreover, the termination of the plan created a special circumstance appearing to leave no participants to pursue any claim except the individuals cashed out by the allegedly insufficient payments.

In contrast, petitioner neither sought vested benefits nor explained how relief for the ESOP Plan would result in any additional "vested benefits" to him. Unlike *Sommers*, there was no liquidation of the ADL ESOP and many current ESOP participants could have sought redress for any perceived harm to the ESOP Plan. (P.A. 20a). The court in *Sommers* added that "[o]n the other hand, a plaintiff who seeks recovery for the trust of an unascertainable amount, with no demonstration that the recovery will directly effect payment to him, would state a claim for damages, not benefits." 883 F.2d at 350. This characterizes precisely petitioner's claim. *See* Dis-

trict Court Memorandum and Order at 5 (P.A. 11a) ("Mr. Crawford's claim is a damage claim comparable to that asserted in *Kuntz*"). In short, *Sommers* is consistent with and supportive of the decision of the Court of Appeals.

Thus, the petition presents no evidence of tension, let alone conflict, between the decision of the Court of Appeals and comparable decisions in other circuits or with other decisions of the Supreme Court.

Finally, petitioner greatly exaggerates a perceived conflict between the Court of Appeals' decision and a District Court opinion from the Southern District of New York, *Reich* v. *Valley Nat. Bank of Arizona*, 837 F.Supp. 1259 (S.D.N.Y. 1993). The Court of Appeals noted that *Reich* was distinguishable (P.A. 60a). *Reich* addressed no standing issue; the case was brought by the Secretary of Labor. Moreover, the two cases arise in different contexts. *Reich* addressed the merits of the ultimate issue in that case after complete discovery and in the absence of any question of standing. In the present case, the decision of the Court of Appeals rested on the threshold issue of whether petitioner was a proper plaintiff. The Court of Appeals never addressed the ultimate issue of whether the ADL ESOP suffered any loss or whether the defendants' actions constituted a violation of ERISA.

Moreover, the Court of Appeal's decision is not contrary to or inconsistent with the ruling in *Reich* because it did not reach the so-called "no loss" theory ascribed to it by petitioner. The portion of the Court of Appeals' decision discussing the impact of a lower purchase price by the trustees of the ESOP arose only in response to the peculiar factual context of the petitioner's attenuated claim that, without record support or even allegations of diminished vested benefits, he could be treated as asserting a colorable claim for vested benefits. Nothing in the Court of Appeals decision concludes

that ESOP trustees who purchase stock from a party in interest for greater than adequate consideration are immune from liability under ERISA. The Court of Appeals only addressed the impact of a hypothetical lower purchase price to demonstrate that petitioner's claim of a personal interest on the record of this case was unfounded. The Court of Appeals reasoned that a lower purchase price for ADL New Shares would not have resulted in any identifiable vested benefit to this petitioner and that, at best, his claim to the contrary was speculative and unsupported by the record:

> We acknowledge that because the ESOP note would have been for less money, the formula by which the encumbered shares were to be released to qualified participants *might* have altered the rate of release of stock one way or the other. The District Court was in no position to know this, however, since plaintiff failed to argue this point and further failed to provide it with the ESOP agreement. Accordingly, there is no basis for the court to infer standing from a putative accelerated release of stock.

(P.A. 44a)

Furthermore, even if a conflict were perceived between the Court of Appeals decision and *Reich*, this would be an inappropriate case to examine the so-called "no loss" theory. The petitioner's inability to satisfy well-established standing prerequisites, his failure even to include the ESOP plan itself in the record, and his palpable inadequacy as a derivative plaintiff on behalf of the ESOP correctly led to summary judgment. The putative "no-loss" theory was never developed on the record, was not necessary to the Court of Appeals' decision and was, at best, tangential to the Court's reasoning.

The other Court of Appeals decision that petitioner cites is a 1984 opinion from the Fifth Circuit, *Donovan* v. *Cunningham*, 716 F.2d 1455 (5th Cir. 1983), *cert. denied* 467 U.S.

1251 (1984). The *Donovan* decision rested on close analysis of particular facts surrounding a purchase, by ESOP trustees, of employer stock. The legal principles informing that analysis on the merits are simply not addressed by the Court of Appeals decision, which reviewed only petitioner's standing claims on the basis of his allegations and the summary judgment record. The only other cases petitioner cites are a number of consistent District Court decisions that addressed payment by ERISA trustees of more than adequate consideration (Petitioner's Brief at 14-15).

Given the lack of conflict on the legal issues actually addressed and the limits of the record appendix before the Court of Appeals, it would be premature for this Court to grant review to resolve a supposed conflict between the First Circuit and a decision by a District Court in a different circuit.

B. *The Petition Does Not Present A Question Of Recurring Importance*

There is no reason for this Court to accept this case for review. This case presents the highly unusual and "atypical" circumstance of a claim brought on behalf of an ESOP plan by someone not a participant in that plan, who does not challenge his employment termination and who makes no claim for unpaid, vested benefits. The petitioner, long ago terminated by his employer, sought to "vindicate" harm he perceived to a pension plan in which he had no economic stake. Indeed, petitioner has economic interests adverse and antagonistic to some of the ESOP participants he sought to champion (P.A. 18a). At the same time, none of the hundreds of actual and current plan participants, a body of highly educated management and technical consultants, saw fit to join or support petitioner (P.A. 19a). The likelihood that this situation would be repeated elsewhere is quite remote.

There is no compelling reason why a former participant purporting to claim on behalf of a plan in which he no longer participates (and from which he has received all vested benefits) should be afforded a right to sue. ERISA established a broad and diverse panoply of remedies, including civil and criminal proceedings available to the government, *e.g.* 29 U.S.C. §1109 [ERISA §409], 29 U.S.C. §§1132 (a)(2), (a)(4), (a)(5) [ERISA §§502(a)(2), (a)(4), (a)(5)], civil actions available to current participants and beneficiaries *e.g.* 29 U.S.C. §1132 (a)(3) [ERISA §502(a)(3)] and civil actions available to plan fiduciaries *e.g. id.* and to the States. 29 U.S.C. §1132 (a)(7) [ERISA §502(a)(7)]. Extending this comprehensive statutory enforcement scheme to former participants who have received all vested benefits, make no claim for wrongful or improper termination and who seek to act on behalf of an ongoing plan with many current, financially interested participants, adds nothing meaningful. To suppose that a viable, important claim might escape the existing enforcement mechanisms ascribes no interest to the persons naturally most interested in the affairs of the plan — the Secretary of Labor, the plan fiduciaries and the plan participants themselves. Deputizing former plan participants, situated like petitioner, to bring claims would address a non-existing "problem" while enhancing the likelihood of officious intermeddling from discontented former employees. Petitioner's claim, as an example, has drawn resources from the ESOP plan itself throughout it's six-year litigation life, and advocates a position "antagonistic" to the economic interest of some ESOP participants without support from a single current plan participant (P.A. 18a-20a). In short, petitioner's own case is compelling reason against extending standing under ERISA to former employees who have received all vested benefits and who make no claim of a reasonable likelihood of returning to covered employment.

C. *This Petition Raises No Misapplication Of Any Federal Rule*

The rules governing the standing of *former* ESOP participants have been well developed. Without a claim that an employee was induced to accept benefits and forego later benefits by misrepresentations of an employer, former employees who have received a lump-sum payment of all vested benefits from an ongoing plan have no standing to assert violations of ERISA. *Mitchell* v. *Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, 498 U.S. 898 (1990); *Teagardener* v. *Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 948 (6th Cir. 1990), *cert. denied*, 498 U.S. 1027 (1991). The courts have anchored ERISA standing to the conventional and reasonable meaning of statutory terms such as vested benefits. *See Firestone Tire & Rubber Co.*, 489 U.S. at 117-118. The Court of Appeals followed this well-established approach here.

The petition advocates a new rule which, if adopted, would obscure, and essentially destroy, any meaningful limit to ERISA standing. The petitioner has proposed enlarging the term "vested benefits" to encompass any recovery by an ESOP Plan that *might* (through a trial court's discretionary exercise of equitable powers or in any other conceivable manner) result in future benefits flowing to a former participant. Such claims would, by nature, be contingent and premised on highly speculative, case-specific supposition. Claims for vested benefits are the opposite in nature. "A benefit is not vested unless it is unconditional and legally enforceable." *Shawley* v. *Bethlehem Steel Corp.*, 989 F.2d 652, 656 (3d Cir. 1993) (citing 29 U.S.C. §1002(19)). As the *Shawley* court went on to say "[a] contingent claim for future benefits does not satisfy the dictates of *Firestone.*" *Id.* at 657.[2]

[2] *See also* 26 C.F.R. §1.411(a)-4(a)(1987) (nonforfeitable, or vested, accrued benefits are those benefits to which a participant has an unconditional right).

By abrogating the inherent limit of the "vested benefits" standard of ERISA standing, petitioner's proposed rule would expand ERISA claims to any former plan participant. This would include plaintiffs, such as petitioner, who have taken all of their benefits, moved on to new employment and seek no return to their former employment. Such a rule would be obnoxious to public policy because ERISA claims based on alleged breach of fiduciary duty are derivative in nature, and necessarily affect the rights of current plan participants of the plan on whose behalf such claims are brought. *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 142 n.9 (1984)(stating that it was "Congress' intent that actions for breach of fiduciary duty [under ERISA] be brought in a representative capacity on behalf of the plan as a whole."); *Thornton* v. *Evans*, 692 F.2d 1064, 1079 n.36 (7th Cir. 1982) (holding that because ERISA claims on behalf of a plan "touch the interest of every beneficiary [] [w]e must therefore determine whether plaintiffs in this action have satisfied the prerequisites of Rule 23.1 to the maintenance of a derivative action."); *Mertens* v. *Kaiser Steel Retirement Plan*, 744 F.Supp. 917 (N.D. Cal. 1990), *aff'd sub nom*, *Mertens* v. *Black*, 948 F.2d 1105 (9th Cir. 1991) (noting that courts must balance the representational nature of ERISA claims with Congress' intent to afford a remedy for breaches of fiduciary duty and "must reconcile the preclusive effect of representative actions with that animating purpose." *Id.* at 920.).

This preclusive effect mandates some outer limit on standing. The Court's articulation of the limits of "participant" in *Firestone*, and subsequent standing interpretations in many decisions by the Court of Appeals, based on that definition, are sound. The expansion petitioner seeks would afford disconsolate former employees a potent *in terrorem* litigation weapon, without countervailing benefit in enforcing the principles of ERISA. To the contrary, petitioner's approach would increase costs and risks to employers, plan fiduciaries and participants, discouraging the establishment of plans encouraged by ERISA.

D. *Summary Judgment Was Proper In This Case Regardless Of The Resolution Of The Issues Presented*

The District Court also found, independent of the resolution of the issues presented by the petitioner, that petitioner would not be an adequate or typical plaintiff to assert derivative or representational claims on behalf of an ERISA plan or plan participants. Specifically, the trial court concluded that the petitioner's claims "are not typical of the claims and defenses of the class." (P.A. 17a). The District Court also ruled that there were "economic antagonisms" between the petitioner and current participants in the ADL ESOP, and that, as a terminated employee, the petitioner "has a unique motive for bringing this case" that renders him atypical and inappropriate as a derivative plaintiff (P.A. 19a).

This alternative, but sufficient, ground for summary judgment was not addressed by the Court of Appeals, but remains an independent basis for denying the petition. As the District Court made clear, more than one reason made summary judgment appropriate in this case (P.A. 5a-6a, 15a, 16a-20a).

## CONCLUSION

Crawford's petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 10 1995
OFFICE OF THE CLERK

No. 94-1302

In The

# SUPREME COURT OF THE UNITED STATES

October, 1994, Term

PETER A. CRAWFORD, Petitioner,

v.

CHARLES R. LAMANTIA et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**A. The "No Loss" theory adopted by the First Circuit below was central to distinguishing Crawford's case from *Sommers Drug Stores Co. Employee Profit Sharing Plan v. Corrigan*, 883 F.2d 345 (5th Cir. 1989).**

The ESOP Trustees stated in their brief in opposition at page 12, that "[t]he putative "no loss" theory was never developed on the record, *was not necessary to the Court of Appeals' decision and was, at best, tangential to the Court's reasoning." (emphasis added).* To the contrary, after painstakingly repeating Crawford's argument that he fell within the second prong of *Firestone*, the Court distinguished the facts in Crawford from *Sommers* based on the "no loss" theory.

> Plaintiff does not contend that he has a reasonable expectation of returning to covered employment, instead he argues that he has a colorable claim to benefits as a former employee because, "but for" defendants' breach of fiduciary duty, he would have received additional vested benefits at the time he received his lump sum payment from the ESOP. Plaintiff reaches the conclusion in stages. First, he notes that, under 29 U.S.C. § 1109(a), fiduciaries who breach their fiduciary duties must make good to the plan any losses resulting from their breach. In this case, therefore, defendants would have to reimburse the plan the difference between the amount of money paid for the new shares of ADL stock and the true market value...[Pursuant to equitable powers granted by 29 U.S.C. § 1109(a) and] [r]elying upon *Sommers*, 883 F.2d at 350, Plaintiff's share should be calculated by dividing the number of the shares he received when he left (47) by the total number of shares 546,520 and multiply that fraction (.0008) by the overpayment.

*Crawford v. LaMantia*, 34 F.3d 28, 32-33 (1st Cir. 1994).

After stating Crawford's argument that he did not receive additional vested benefits due him by reason of the overpayment, the First Circuit distinguishes Crawford's claim from *Sommers* based solely on the "no loss" theory.

> Unlike the claimants in *Sommers*, Plaintiff has failed to show that Defendants' breach of fiduciary duty has a direct effect on his benefits...Had Defendants not overvalued the shares, they would not have borrowed as much money from ADL. Instead a recalculation of the price of the stock would have resulted only in a smaller loan, lower principal and interest payments, etc.. . .It would *not* have resulted in a smaller loan with any excess cash being distributed back to the Participants.

*Id.* at 33.

According to the First Circuit, Crawford did not suffer a loss of vested benefits when the ESOP Trustees paid too much for the ADL shares, by reason of the First Circuit's adoption of the "no loss" theory. Thus, the First Circuit has adopted a legal theory, the "no loss" theory, wholly without legal precedent or support and at odds with the "adequate consideration" guidelines set forth in the Statute (ERISA 408(e), 29 U.S.C. § 1108(e)).

> Such a policy would eviscerate the congressional intent behind protections entered for plan participants and would lead to the conclusion that an ESOP could participate in a

> leverage buyout and pay any price per share possible without suffering any loss no matter how clear the price. This renders the `adequate consideration' protection at 29 U.S.C. § 1108(e) a nullity.

*Reich v. Valley National Bank of Arizona*, 837 F. Supp. 1259 (S.D. N.Y. 1993).

**B. Conflict Between the Circuits**

Despite the ESOP Trustees' contention that this case does not present a conflict between the circuits, they failed to consider a whole line of cases such as *Kuper, Ruocco, Wright and Amalgamated* which all found standing for former employees in similar circumstances. Crawford reincorporates the argument set forth in pages 8-10 of his petition.

**C. The Public Policy considerations favor granting this Petition for Certiorari.**

The ESOP Trustees argue, at page 16 of their brief, that public policy considerations should dictate that Crawford be denied standing "the expansion Petitioner seeks would afford disconsolate former employees a potent *in terrorem* litigation weapon, without a countervailing benefit in enforcing the principles of ERISA."

In fact, there are public policy reasons supporting the broadened view of standing that Crawford has advocated. The Secretary of Labor sought to file an amicus brief with the First Circuit in this case. In its application for leave at A-50-51,

citing *Reich v. Valley Nat'l Bank*, 837 F. Supp 1259 (S.D. N.Y. 1993), the Secretary of Labor represented that:

...[I]t would be inconsistent with the structure and purpose of ERISA, and contrary to the "adequate consideration" requirement of ERISA 408(e), to hold that a leveraged ESOP can, in effect, pay any price per share for employer stock, no matter how high, without suffering a loss.

As the Secretary of Labor's application for leave was foreclosed at the First Circuit, only Crawford, a former employee with unpaid vested benefits, can advance the public policy concerns embodied in ERISA, that plan trustees not pay in excess of "adequate consideration" for employer stock.

## C. Conclusion

For all the reasons set forth above, and in the Petition for Writ of Certiorari, Crawford requests that the Court grant this Petition for Writ of Certiorari.

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